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# Supreme Court of the United States.

OCTOBER TERM, 1970.

No. 804.

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THOMAS S. EISENSTADT, SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS, *Appellant*,

v.

WILLIAM R. BAIRD, *Appellee*.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Filed October 5, 1970.**
**Probable Jurisdiction Noted March 1, 1971.**

## Relevant Docket Entries.

COMMONWEALTH OF MASSACHUSETTS, SUPERIOR COURT.

1967

June 5 Indictment returned.
9 Defendant comes into Court—indictment read to defendant—pleads not guilty.
29 Defendant files motion to dismiss.
Oct. 17 Defendant comes into Court.
Defendant files waiver of right to trial by jury.

Trial without jury (with indictment No. 29689) before Macaulay, J.

Defendant's motion to dismiss, after hearing, denied.

Finding guilty.

Defendant's motion for a report to the Supreme Judicial Court, filed and allowed. Macaulay, J.

Nov. 3. Report of Macaulay, J., filed.

Dec. 15 Report, two copies of transcript and all exhibits entered in Supreme Judicial Court. Attorneys. Rescript from Supreme Judicial Court filed.

May 1 "In answer to the question we state: General Laws, Chapter 272, Section 21 is unconstitutional as applied to the defendant in case No. 29689, for unlawfully exhibiting certain articles for the prevention of conception but Section 21 is constitutional as applied to the defendant in case No. 29688 for unlawfully giving away, a certain medicine and article for the prevention of conception."

May 19 Comes into Court—Three Months House of Correction, Suffolk County.

Defendant's motion for stay of execution of sentence filed and allowed. Recognizes personally without surety in the sum of $1000.

Feb. 6 Comes into Court—Commonwealth files motion to revoke stay of execution of sentence—defendant files petition for modification of sentence, denied. Commonwealth's motion for revocation of sentence allowed. Stay of sentence revoked. Three Months, Common Jail—Court orders that defendant commence serving sentence on February 20, 1970. Mittimus issued.

COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT.

Entered December 15, 1967.

Argued December 2, 1968.

May 1 In answer to the question we state: G. L. c. 272, § 21, is unconstitutional as applied to the defendant in case No. 29689 for unlawfully exhibiting certain articles for the prevention of conception, but § 21 is constitutional as applied to the defendant in case No. 29688 for unlawfully giving away a certain medicine and article for the prevention of conception.

Rescript May 1, 1969.

Reasons as on file.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

1970

Feb. 11 Petition for writ of habeas corpus, filed.

12 Julian, J. Order to show cause issued directing the respondent to make a return certifying the true cause of the detention of petitioner on or before February 17, 1970 at 5:00 p.m.

16 Letter to Clerk re setting of bail, filed.

17 Respondent's Return, filed.

17 Motion to dismiss, filed.

19 Opposition to application for bail, filed.

19 Motion of petitioner to amend petition for writ of habeas corpus by striking last page of petition and substituting amendments attached hereto, filed.

Feb. 19 Julian, J. Motion granted.

24 Julian, J. Court's Action on Petitioner's Application for Bail entered. . . . Accordingly, the petitioner's application for bail is denied. The petition is set down for hearing on the merits on Friday, February 27, 1970 at 10:30 a.m.

25 Writ of habeas corpus issued—returnable February 27, 1970 at 10:30 a.m.

27 Julian, J. Hearing on petition for writ of habeas corpus. Counsel agree to submit the case on the existing record before the State Court. Memorandum of law in support of issuance of writ of habeas corpus, filed. Respondent is granted until 5:00 p.m., Tuesday, March 3, 1970, to file a reply brief.

Mar. 3 Memorandum in opposition to the granting of a petition for writ of habeas corpus, filed.

20 Julian, J. Opinion filed . . . . In accordance with the provisions of 28 U.S.C. Sec. 2254(a), the petition is dismissed.

23 Julian, J. Order of Dismissal entered.

26 Motion for certificate of probable cause filed.

26 Motion to be admitted to bail pending appeal filed.

26 Notice of appeal filed.

Julian, J. "A certificate of probable cause should not issue from this court because petitioner fails to state in his motion any reason why such certificate should issue and because the court is not satisfied that sufficient cause exists for the issuance of such certificate."

Mar. 27 Julian, J. "For the reasons given in this court's memorandum of February 24, 1970, in which petitioner's application for bail was denied and for the reasons set forth in this

court's opinion of March 20, 1970, for the dismissal of the petition for a writ of habeas corpus, this motion to be admitted to bail is denied."

Mar. 27 Memorandum and order of court of appeals entered. ". . . . Viewed by us independently, at least some of the petitioner's four grounds of attack upon the statute appear to have some vitality. On this basis a certificate should issue. On the matter of bail, petitioner's sentence has some 8 weeks to run. In accordance with our frequent practice, we consider that for him to have to serve half of his entire sentence while his appeal is brought to issue would seem an unfair procedure. The parties will present the customary papers for release on his personal recognizance. It is ordered that petitioner appellant be enlarged upon bail in the amount of $1000.00 without surety upon his execution of such bond and that he answer all orders of this court, with said bond to be filed with the clerk of this court by March 30, 1970."

Mar. 27 Original pleadings delivered to the court of appeals.

July 6 Opinion from the court of appeals entered. ". . . the order of the District Court is vacated, and the action remanded thereto with instructions to grant the writ discharging the petitioner."

27 Mandate from court of appeals entered.

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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

1970

Mar. 27 Record on appeal in one volume filed and case docketed.

| | |
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| May 26 | Assigned for hearing at the June, 1970, session. |
| June 4 | Heard before Aldrich, McEntee and Coffin, JJ. |
| July 6 | Judgment: The order of the district court is vacated, and the action is remanded to that Court with instructions to grant the writ discharging the petitioner. Opinion by Aldrich, Ch.J. Notices sent. |
| July 21 | Notice of appeal, filed. |
| July 27 | Mandate issued; copy filed. Taxation of costs filed. Original papers returned to the district court. |
| 1971 | |
| Mar. 15 | Certified copy of order of Supreme Court (3/1/71) noting probable jurisdiction filed. |

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## Indictment.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, s.s. At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of June, in the year of our Lord one thousand nine hundred and sixty-seven

The Jurors for the Commonwealth of Massachusetts on their oath present that William R. Baird, on the sixth day of April, in the year of our Lord one thousand nine hundred and sixty-seven, did unlawfully give away a certain medicine and article for the prevention of conception, to wit: Emko Vaginal Foam, the giving away of the said medicine and article by the said William R. Baird not being in accordance with, or authorized or permitted by,

the provisions of Section 21A, of Chapter 272, of the General Laws of the said Commonwealth.

A True Bill.

HAROLD JOHNSON,
Foreman of the Grand Jury.

JOHN A. PINO,
Assistant District Attorney.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

**Petition for Writ of Habeas Corpus.**

[Filed February 11, 1970.]

To the Honorable the Judges of the United States District Court, District of Massachusetts:

Respectfully represents your petitioner, William R. Baird, as follows:

1. That he is being deprived of his liberty and is to be held in custody at the Suffolk County Jail, Boston, Suffolk County, Massachusetts.

2. That the respondent, Thomas S. Eisenstadt, is the Sheriff of Suffolk County, Massachusetts, and as such is the person who has custody of individuals sentenced to the Suffolk County Jail.

3. On June 5, 1967, your petitioner was indicted by the Suffolk County (Massachusetts) Grand Jury. One indictment charged petitioner with "unlawfully giving away a certain medicine and article for the prevention of conception, to wit; Emko Vaginal Foam." The second indictment charged petitioner with "unlawfully exhibiting certain articles for the prevention of conception, to wit: diaphrams, trojan prophylactics and intra-uterine devices."

4. Petitioner was put on trial on October 17, 1967. Both indictments were tried to the Court, petitioner having

waived jury trial. Following trial petitioner was found guilty on each indictment. Motions to Dismiss each indictment filed prior to trial were denied and exceptions were taken to the Court's rulings. The trial judge being of the opinion that the Motions to Dismiss raised questions of law which were both doubtful and important reported a question for decision to the Supreme Judicial Court of Massachusetts. The question reported is as follows: "Are the provisions of General Laws (Ter. Ed.) Chapter 272, Section 21 constitutional?"

5. The reported question was considered by the Supreme Judicial Court of Massachusetts, which on May 1, 1969 decided the question as follows: "General Laws Chapter 272, Section 21, is unconstitutional as applied to the defendant in case No. 29689 for unlawfully exhibiting certain articles for the prevention of conception, but Section 21 is constitutional as applied to the defendant in case No. 29688 for unlawfully giving away a certain medicine and article for the prevention of conception." Three justices of the Supreme Judicial Court dissented.

6. Thereafter petitioner was sentenced to a term of three months in the Suffolk County House of Correction. Execution of the sentence was suspended to February 6, 1970. On February 6, 1970, the sentence was re-imposed but due to illness of petitioner, he was not committed on that date. Petitioner was directed to report to the Sheriff of Suffolk County to commence serving this sentence on February 20, 1970.

7. Your petitioner is presently being deprived of his liberty by the respondent and is to commence serving this sentence on February 20, 1970. He is to serve the sentence imposed on him in the Suffolk County Jail, Boston, Suffolk County, Massachusetts, which is within the judicial district of this Court.

8. Petitioner has exhausted his available state remedies as required by 28 U.S.C. 2254. The Supreme Judicial

Court of Massachusetts decided the issues contained in this petition. *Commonwealth* v. *Baird*, 355 Mass. 746; 247 N.E. 2d 574. Certiorari was denied by the Supreme Court of the United States on January 12, 1970, Mr. Justice Douglas being of the opinion that certiorari should be granted. *Baird* v. *Massachusetts*, 707 Misc., October Term 1969 ——— U.S. ———.

9. The conviction and sentence pursuant to which your petitioner is being deprived of his liberty were imposed in violation of (a) the First Amendment to the Constitution of the United States prohibiting an abridgment of the freedom of speech, the right of the people peaceably to assemble and to petition the government for a redress of grievances, (b) the Ninth Amendment to the Constitution and (c) Section 1 of the Fourteenth Amendment to the Constitution of the United States. The facts showing these constitutional violations are as follows:

At the invitation of faculty members, petitioner addressed a group of students at Hayden Auditorium at Boston University on April 6, 1967. There was present an assembly of approximately two thousand people. Petitioner's address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards as well as a display of contraceptive devices in their original packages. In addition, petitioner spoke of the respective merits of various contraceptive devices; overpopulation in the world; crises throughout the world due to overpopulation; the large number of abortions performed on unwed mothers; quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Petitioner also encouraged members of the audience to petition the Massachusetts Legislature and to make known their feelings with regard to birth control laws in order to bring about a change in the laws. Petitioner further stated that he

knew he was violating the law and invited arrest. At the close of the address, petitioner invited members of the audience to come to the stage and help themselves to the contraceptive articles. He personally handed a young lady a package of Emko Vaginal Foam and was then arrested.

WHEREFORE, your petitioner prays:

1. That an Order of Notice be issued directing the respondent to show cause why the writ should not be granted.

2. That a hearing be held on the merits of this petition.

3. That a Writ of Habeas Corpus be issued directing the respondent to discharge the petitioner from any further custody or restraint on his liberty.

4. That pending the determination of the merits of this petition, the execution of petitioner's sentence be stayed and the petitioner be admitted to bail.

5. For such other and further relief as this Court deems just.

By his attorney,

JOSEPH J. BALLIRO.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

**Return.**

[Filed February 17, 1970.]

Now comes the respondent in the above entitled matter and, by his attorney, makes the following return and answer to the petition for a writ of habeas corpus filed herein:

1. Respondent denies that petitioner is presently deprived of his liberty as alleged in paragraph 1 of the petition, but, upon information and belief, admits the remaining allegations contained in that paragraph.

2. Respondent admits the allegations contained in paragraph 2 of the petition.

3. Respondent admits the allegations contained in paragraph 3 of the petition.

4. Respondent admits the allegations contained in paragraph 4 of the petition.

5. Respondent admits the allegations contained in paragraph 5 of the petition.

6. Respondent admits the allegations contained in paragraph 6 of the petition.

7. Respondent denies that he is presently depriving petitioner of his liberty as alleged in paragraph 7 of the petition, but, upon information and belief, admits the remaining allegations of fact contained in said paragraph.

8. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the petition to the extent that it is alleged that the issues raised in this petition have been passed upon by the Massachusetts Supreme Judicial Court, and therefore calls upon petitioner to prove the same. In all other respects, respondent admits the allegations contained in said paragraph.

9. Respondent denies the allegations contained in paragraph 9 of the petition to the effect that his conviction and sentence are unconstitutional, but, upon information and belief, admits the remaining allegations of fact contained therein.

THOMAS S. EISENSTADT,

Respondent.

By his attorney:

ROBERT H. QUINN,

Attorney General.

LAWRENCE P. COHEN,

Assistant Attorney General.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

**Notice of Appeal.**

[Filed March 26, 1970.]

Notice is hereby given that William R. Baird, Petitioner in the above-captioned action hereby appeals the United States Court of Appeals for the First Circuit from the order dismissing his Petition for Habeas Corpus entered in this action on March 20, 1970.

March 26, 1970.

JOSEPH J. BALLIRO
Attorney for William R. Baird,
Petitioner.

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UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT.

**Motion for Certificate of Probable Cause.**

[Filed .]

Now comes the Petitioner, William R. Baird, and respectfully moves this Honorable Court for a Certificate of Probable Cause in order that he may appeal the dismissal of his Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

By his attorney,
JOSEPH J. BALLIRO.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Misc. No. 387.

WILLIAM R. BAIRD,
Petitioner,
v.
THOMAS S. EISENSTADT, as he is
Sheriff of Suffolk County, Massachusetts,
Respondent.

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[U.S.D.C., Mass., Civil No. 70-16-J]

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Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

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**Memorandum and Order.**

Entered March 27, 1970.

Petitioner, Baird, having been convicted in the Superior Court under Mass. G. L. c. 272 § 21 for unlawfully giving away an article for the prevention of contraception to an unmarried female, and his conviction having been affirmed by the Supreme Judicial Court, *Commonwealth* v. *Baird*, 1969, Mass. A.S. 727, and certiorari having been denied on January 20, 1970, is now serving a three-months sentence. He brought a petition for habeas corpus in the Massachusetts District Court, which was denied in a careful and comprehensive opinion on March 20, 1970. Peti-

tioner sought a certificate of probable cause for appeal and for release on bail, both of which requests were denied by the district court on March 27. He now makes the same requests of this court.

In the light of the fact that three of the seven Massachusetts Justices were of the opinion that petitioner's conviction was unconstitutional, we find it difficult to think that the appeal lacks merit. Viewed by us independently, at least some of the petitioner's four grounds of attack upon the statute appear to have some vitality. On this basis a certificate of probable cause should issue.

On the matter of bail, petitioner's sentence has some 8 weeks to run. In accordance with our frequent practice, we consider that for him to have to serve half of his entire sentence while his appeal is brought to issue would seem an unfair procedure. The parties will present the customary papers for release on his personal recognizance.

It is ordered that petitioner appellant be enlarged upon bail in the amount of $1000.00 without surety upon his execution of such bond and that he answer all orders of this court, with said bond to be filed with the Clerk of this court by March 30, 1970.

By the Court:
DANA H. GALLUP,
Clerk.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST DISTRICT.

**Notice of Appeal to the Supreme Court of the United States.**

[Filed .]

I. Notice is hereby given that Thomas S. Eisenstadt, as he is Sheriff of Suffolk County, Massachusetts, the Re-

spondent, Appellee above-named, hereby appeals to the Supreme Court of the United States from the final order entered by the United States Court of Appeals for the First Circuit in the above-entitled action on July 6, 1970, granting a habeas corpus petition of the Appellant, William R. Baird, and reversing the order of the United States District Court for the District of Massachusetts, dismissing such petition.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

JOSEPH P. NOLAN,
Attorney for THOMAS S. EISENSTADT.

# COMMONWEALTH
*v.*
# WILLIAM R. BAIRD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.
355 Mass. 746, 247 N.E. 2d 574 (1969).

WILKINS, C.J. These are two indictments charging violations of G. L. 272, § 21, one (No. 29,688) for unlawfully giving away a certain medicine and article for the prevention of conception, the other (No. 29,689) for unlawfully exhibiting certain articles for the prevention of conception, both being not in accordance with G. L. c. 272, § 21A. The evidence shows that these acts occurred during, and incidental to, a lecture to students in an auditorium of an educational institution. The case, along with two motions to dismiss based on constitutional grounds, was heard by a judge of the Superior Court sitting without jury.

The defendant, pursuant to invitation, addressed a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967. The address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed with diagrams on two demonstration boards or contained in a cardboard box and with an exposition of their respective merits. During the address he stated that he was violating the statute and invited arrest. At the close the defendant invited the members of the audience to come to the stage and to help themselves to the contraceptive articles. The defendant personally handed to a young lady a package of Emko vaginal foam, an admittedly contraceptive substance. At this point a police officer told the defendant to call his attorney to the stage and to "wind it up." The defendant was then taken to police headquarters in company with his attorney, who remained with him.

Following arguments, the judge made a finding of guilty, and denied the motions to dismiss. Being of the opinion that the defendant's motions raise questions of law which are both doubtful and important and require decision by the Supreme Judicial Court, he reported the case in accordance with G. L. c. 278, § 30, both parties assenting thereto. The report incorporates by reference the stenographic record and the exhibits, and contains all the material facts necessary for a review of the following question of law: Are the provisions of G. L. c. 22, § 21, constitutional?

The material part of G. L. c. 272, § 21, as amended through St. 1966, c. 265, § 3, is: "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion . . . shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

The exception in § 21 referring to § 21A was inserted by St. 1966, c. 265, § 3. Section 21A was set forth in c. 265, § 1, which reads in part: "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained."

The amendments made by St. 1966, c. 265, were brought about by the decision in *Griswold* v. *Connecticut*, 381 U. S.

479, which held unconstitutional as applied to married persons a statute prohibiting the use of contraceptives and the giving of advice on the subject.

The *Griswold* case and the ensuing statutory amendments swept away the ground of decision in *Commonwealth* v. *Gardner*, 300 Mass. 372 (1938), which upheld convictions of individuals who were charged with selling or giving contraceptives to married women even if "intended to be used for the prevention of conception only upon prescription by a duly qualified physician when necessary for the preservation of life or health according to sound and generally accepted medical practice" (p. 374). They did not, however, repeal the prohibition against laymen furnishing information or providing contraceptives, and they did not enlarge the group who might be so informed or thus provided. Unmarried individuals are still excluded.

There is nothing in § 21 purporting to prohibit giving advice, discussing, or lecturing on the subject of contraceptives. The two indictments, both limited to § 21, understandably do not call into question anything that the dedefendant said, but charge that he unlawfully gave away "a certain medicine and article," and unlawfully exhibited "certain articles for the prevention of conception." The defendant contends that his acts must be classified as speech, and are within the protection of the First Amendment. *Cox* v. *Louisiana*, 379 U. S. 559, 563. See *Commonwealth* v. *Dubin*, 327 Mass. 681. Compare *United States* v. *O'Brien*, 391 U. S. 367, 376. But merely because his acts are so classified does not assure constitutional protection.

An aspect of speech which does not receive constitutional protection is obscenity. *Roth* v. *United States*, 354 U. S. 476, 484-485. In some earlier decisions in this Commonwealth dealing with contraception it can be inferred that obscenity was a basis. See, for example, *Commonwealth* v. *Allison*, 227 Mass. 57 (1917), a prosecution under a prede-

cessor statute of G. L. c. 272, § 21, for the advertising, publication, and distribution of birth control pamphlets, which were described (p. 60) as "too indecent to be spread upon the records." In that case it was stated (p. 62), "The distribution of obscene printing was indictable at common law"; and (pp. 61-62): "One test of obscenity has been said to be whether its tendency is 'to deprave and corrupt those whose minds are open to such immoral influences.' *The Queen* v. *Hicklin*, L. R. 3 Q. B. 360, 371."

In *Roth* v. *United States*, 354 U. S. 476, 489, the opinion of the court stated, "The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." The *Roth* test was accepted as binding by this court. See *Commonwealth* v. *Monic*, 338 Mass. 442, 443; *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 13-20; *Attorney Gen.* v. *"John Cleland's Memoirs of a Woman of Pleasure,"* 349 Mass. 69, 70-72, revd. sub nom. *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney Gen. of Mass.* 383 U. S. 413.

In *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney Gen. of Mass.* 383 U. S. 413, 418, the majority opinion contained the following: "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The *Memoirs* case was treated as controlling in *Attorney Gen.* v. *"Naked Lunch,"* 351 Mass. 298, 299.

Tested by these standards, it cannot rightly be contended that the defendant's address was obscene in the constitutional sense. As was said in the *Roth* case, 354 U. S. at 484, "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interest." See *Commonwealth* v. *Moniz*, *supra*, 446; *Attorney Gen.* v. *"Tropic of Cancer*, *supra*, 14."

There is another type of speech which does not have constitutional protection because it may "encroach upon the limited area of more important interest." This might apply if it is deemed "to create a clear and present danger" of substantive evil, to quote from Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52, or where "there . . . [is] reasonable ground to . . . [believe] that serious evil will result," to use the language of Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376. This is a subject fraught with difficulty for a State court, as the Justices have indicated in the past. See *Opinion of the Justices*, 349 Mass. 786, 791-793.

But where recent pronouncements of the Supreme Court of the United States seem to declare that the legislation may constitute an unwarranted interference with freedom of speech, it becomes our duty to ascertain, and apply, the meaning of those cases by which we are bound. This is the course we have endeavored to follow in the past. See *Commonwealth* v. *Pascone*, 308 Mass. 591, 594; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 339, 342; *Commonwealth* v. *Dubin*, 327 Mass. 681, 682-683.

In the *Griswold* case, 381 U. S. 479, the court's opinion stated (p. 482): ". . . [T]he State may not, consistently

with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . .'' The reference to freedom of speech in the *Griswold* case was a basis of the decision of the Supreme Court of New Jersey in *State* v. *Baird*, 50 N. J. 376, 380, which reversed the conviction of the one who is the defendant in the case at bar. He was there charged with having "exposed to the view of others contraceptives used to prevent birth." This had occurred in a van on a parking lot. The court noted that the New Jersey statute merely forbade display or exposure if "without just cause, and said that there was no conduct suggestive of obscenity or of obtrusiveness, pandering and the like; and that "the display or exposure was made in inoffensive circumstances and was incidental to the good faith explanation of birth control to a woman who had made specific inquiry on the subject" (p. 379). The court also emphasized that the enumeration of rights quoted from the *Griswold* case furnished protection for the defendant's conduct; saying (p. 380), "the display and exposure of the contraceptive devices were part and parcel of the dissemination and merely served to illustrate and clarify the information being properly given and received."

As has been noted, the defendant was not indicted for anything he said. We have to consider whether the exhibition of contraceptive devices, for which he was indicted, was incidental to, and part of, the lecture, and thereby within the protection of the First Amendment. The display of those articles was essential to a graphic representation of his subject.

We are of opinion that delivery of the lecture was an exercise of a right of free speech which has First Amendment

protection. To the extent that § 21 prohibits exhibiting, it is unconstitutional as applied to the defendant in this case.

The indictment which charges giving away an article "for the prevention of conception" stands on a different footing.[1] There do not appear to be decisions binding upon us which show that the charge would be held to be constitutionally invalid. Since St. 1879, c. 159, § 1, the public policy of this Commonwealth, as legislatively declared, has included a prohibition against distribution of articles for the prevention of conception. Not until the recent amendment by St. 1966, c. 265, § 3, was any exception made in favor of doctors and others who by training or occupation might be deemed to have acquired a special qualification as distributors. The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences. In these circumstances, absent any definite intimation, we shall not guess as to the probable attitude of the Supreme Court of the United States.

Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond legislative power. Unlike the legislation in *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 424-426, the prohibition in § 21, as applied to the defendant in this case, is directly related to a legitimate legislative purpose. The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.

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[1] In *Griswold* v. *Connecticut*, 381 U. S. 479, see dissenting opinion of Stewart, J. at p. 529, fn. 3: "If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials."

The bestowal of this item upon an individual in the audience added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment. We do not accept the argument advanced in a brief of an amicus curiae that the gift of the foam was one of the "appropriate types of action" embraced within the guaranty of freedom of speech as stated in *Brown* v. *Louisiana*, 383 U. S. 131, 142. See *United States* v. *O'Brien*, 391 U. S. 367, 376. If, as there also contended, it is "implementing conduct . . . in the nature of advocacy," a phrase quoted to us from *National Labor Relations Bd.* v. *International Longshoremen's Assn.* 332 F. 2d 992, 999 (4th Cir.), we shall leave such declaration to be made elsewhere.

Even accepting the statute as constitutional in prohibiting distribution, there still must be considered whether there has been a violation in this respect. It is argued that the act of giving away the device should have been, but was not, accompanied by an intention that the article be used for the prevention of conception. See *Commonwealth* v. *Corbett*, 307 Mass. 7 (1940), which construed G. L. c. 272, § 21, and states (12n.), "As has been shown, the words of the statute require proof of intended use for an illegal purpose, and are not satisfied by mere incidental result." The contention is developed that on the evidence the distributor's intent could have been any of a variety of reasons, including inviting arrest in order to test the validity of the statute. But the judge made no findings on this point, and we are not able to do so. There is also nothing to show that unlawful use was intended by the recipient. See the *Corbett* case, *supra* 10.

In the case last cited, the article, according to the opinion of the majority, had ambiguous purposes. Had it been advertised as for the prevention of conception, the defendant could have been convicted. *Commonwealth* v. *Goldberg*, 316 Mass. 563. In the case at bar, the foam, as found by the

judge, was admittedly a contraceptive, and the plea in behalf of contraceptives presented in the defendant's address has an effect analogous to the advertising in the *Goldberg* case. There was enough to warrant a finding of guilty on the indictment for giving away.

The defendant also invokes the Eighth Amendment arguing that the imposition of the maximum permitted penalty of five years for a violation of § 21 would be cruel and unusual punishment. He stresses that the penalty prescribed is as severe, or more so, as any to be found in statutes creating other offences which are serious crimes. We quote examples which carry a sentence of five years: Misprision of treason. G. L. c. 264, § 3. Indecent assault and battery on child under fourteen. G. L. c. 265, § 13B. Burning of insured property with intent to defraud. G. L. c. 266, § 10. Unnatural and lascivious acts with child under sixteen. G. L. c. 272, § 35A. The maximum sentence for adultery is three years and that for fornication is three months.

The maximum sentence is extremely severe, particularly when compared with the sentences provided in birth control legislation of twenty-three States cited in the defendant's brief, and with sentences for other crimes in this Commonwealth.

Since the defendant has not been sentenced, we decline further to discuss this question at this time. See *Commonwealth* v. *Leis*, *ante*, 189, 198-199.

The defendant contends that the prohibition against giving away is not separable from the other provisions of § 21 relating to violations of the First Amendment. The only word which is affected by this opinion is "exhibits" as it applies to the defendant in giving the lecture. It may be constitutional in its application to others. This does not render it doubtful whether the Legislature would enact the balance of the statute, as in *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127. In contemplation of the his-

tory of the statute, both remote and recent, we do not believe that the Legislature would prefer to have the entire statute fall if under the First Amendment the word "exhibits" cannot stand, nor do we believe that in that circumstance they would prefer to treat as innocuous the other acts set forth in § 21:—selling or lending or giving away or offering to sell, lend or give away any of the prohibited articles.

The current dispute could have been more appropriately considered under proceedings for a declaratory decree. G. L. c. 231A. See *Mansfield Beauty Academy, Inc.* v. *Board of Registration of Hairdressers*, 326 Mass. 624. The choice of openly challenging the criminal law was unnecessary if the purpose was merely to test the statute and not for some other purpose, such as compelling public attention. See *State* v. *Baird*, 50 N. J. 376, 378-379.

From the fact that we rest this decision wholly upon the Federal Constitution and largely upon its construction by the Supreme Court of the United States, no inference should be drawn that the Declaration of Rights of the Constitution of the Commonwealth is less capable of protecting the essentials of freedom of speech, of press, and of assembly than is the Federal Constitution. *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 343.

In answer to the question we state: G. L. c. 272, § 21, is unconstitutional as applied to the defendant in case No. 29,689, for unlawfully exhibiting certain articles for the prevention of conception, but § 21 is constitutional as applied to the defendant in case No. 29,688, for unlawfully giving away a certain medicine and article for the prevention of conception.

*So ordered.*

WHITTEMORE and CUTTER, JJ. (dissenting in part).

1. We concur in the first part of the majority opinion, viz.

that Baird cannot be convicted constitutionally under § 21 for unlawfully exhibiting contraceptive articles. We also agree that raising these issues of constitutionality by declaratory proceedings would have been more appropriate than the course pursued by Baird.

2. We concur with what Mr. Justice Spiegel says in point First (set out in the fourth paragraph) of his dissenting opinion concerning the propriety of treating Baird's distribution of articles as constitutionally protected protest and speech.

3. We dissent from so much of the majority opinion as holds that Baird may be convicted under § 21 of distributing contraceptive articles, because we think (a) that § 21, read with § 21A, has been so much eroded in the last half century as to be now unconstitutionally vague, and (b) that the prohibition of distributing found in § 21 is not severable from invalid portions of the section.

*First*—Section 21 was designed (see *Commonwealth* v. *Allison*, 227 Mass. 57, 62, concerning a predecessor statute) to prohibit essentially all assistance of birth control. The section was described in *Commonwealth* v. *Gardner*, 300 Mass. 372, 374-375, as "plain, unequivocal and peremptory" and as containing "no exceptions." Its scope, however, has been cut down greatly since the *Allison* decision in 1917 in the following ways.

(1) In *Commonwealth* v. *Corbett*, 307 Mass. 7, 12, it was held that there could not be a conviction under § 21 for the sale of an article, susceptible of use to prevent disease as well as for contraception, without proof that, in a particular case, the latter use was intended.

(2) Any use of the statute to prohibit serious discussion and assistance of birth control by speech, on the ground that it is inherently obscene, has become constitutionally impossible because of decisions of the Supreme Court of the United States referred to in the first part of the majority opinion.

(3) *Griswold* v. *Connecticut*, 381 U.S. 479, has greatly limited the possible application of § 21.

(4) The enactment of § 21A has permitted, subject to some limitations, the furnishing (by specified persons) of contraceptive articles and information to married persons.

(5) It remains uncertain to what extent § 21 may be constitutionally applied to prohibit advertising and manufacturing of contraceptives.

(6) The opinion in the present case concerning the invalidity of the prohibition of exhibiting contraceptives makes unenforceable a major provision of § 21. We think that the statutory prohibition of exhibiting necessarily applies to so many persons and so invades their freedom of speech as to make this prohibition unconstitutional on its face.

The consequence of these inroads or possible inroads on § 21 leaves it, when read with § 21A, of highly uncertain content and scope. We regard what remains of § 21 as comparable to the statutes held void for vagueness in *Alegata* v. *Commonwealth*, 350 Mass. 287, 293, 297-298, 300-301. See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695, 708.

*Second*—It is also uncertain what legislative purpose now supports § 21, read with § 21A.

(1) Any valid purpose to suppress obscenity is gone, as the majority opinion shows.

(2) Any general purpose to prevent birth control no longer exists as a result of § 21A.

(3) To say that the legislative purpose is to restrain nonmarital intercourse would attribute to the Legislature an intention to use the risk of pregnancy as a deterrent to, or punishment of, such intercourse. To do so would be contrary to the result and reasoning in *Commonwealth* v. *Corbett*, 307 Mass. 7, 8-12. See *State* v. *Baird*, 50 N. J. 376, 383. For reasons pointed out by Mr. Justice Spiegel in his dis-

sent, with which we agree in large measure, the damage caused by an undesired pregnancy to the unmarried parents, to the unwanted child, and to society as a whole, is so disproportionate to any possible benefit as to raise grave constitutional doubts about the validity of such a deterrent if intended.

(4) We see in § 21 and § 21A, read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons. This circumstance suggests that the only purpose of § 21A was to meet what were believed to be the minimal requirements of the *Griswold* case, 381 U. S. 479.

All these considerations lead us to the conclusion that the crimes originally defined in § 21, and the legislative purposes originally there reflected, are largely gone. There seems to us to be no rational basis for using what little is left of a statute designed to prevent all assistance of all birth control merely to deter nonmarital intercourse. We also see no such basis for severing and separately applying the prohibition of distributing contraceptives, when what remains of the statute of which this prohibition forms a part has become so uncertain. See *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127.

Spiegel, J. (dissenting in part) I agree with the opinion with respect to the indictment charging the defendant with unlawfully exhibiting "certain articles for the prevention of conception."

I agree also that proceedings for declaratory relief would have been far preferable to this needless public demonstration. Such proceedings would have been an orderly method of raising the substantial constitutional issues and could have been so framed in behalf of persons having unquestioned standing as to present adequate facts for adjudication.

I do not concur with the majority's view on the indictment for "unlawfully . . . [giving] away a certain medicine and article for the prevention of conception."

First, I am unable to discern the distinction the majority draw between the defendant's *exhibiting* and the defendant's *distributing*. As the opinion points out "these acts occurred during, and incidental to, a lecture to students." Each of these acts was "implementing conduct . . . in the nature of advocacy." *National Labor Relations Bd.* v. *International Longshoremen's Assn.* 332 F. 2d 992, 999 (4th Cir.). Basically the distribution should be considered part of constitutionally free speech and protest. See *Cox* v. *Louisiana*, 379 U. S. 536.

Second, I do not believe that §§ 21 and 21A reveal the "legitimate legislative purpose" claimed by the majority. The Legislature undoubtedly has the right to protect the health and safety of the public. However, I cannot infer or determine such an intent from a statute which limits the procurement of contraceptive devices to married persons. The adoption of § 21A permitting married persons to receive birth control devices with a prescription can only be interpreted as an attempt to save §§ 20 and 21 from the edict of the Supreme Court of the United States in the case of *Griswold* v. *Connecticut*, 381 U. S. 479. It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles "which may have undesirable, if not dangerous, physical consequences." If that was the Legislature's goal, § 21 is not required. See G. L. c. 94, § 187A; Federal Food, Drug & Cosmetic Act, 21 U. S. C. § 353 (1964).

Nor do I believe that the purposes set forth by this court over fifty years ago in the case of *Commonwealth* v. *Allison*, 227 Mass. 57, 62, are valid today.[1] Even if we dis-

[1] "Manifestly . . . [the statutes] are designed to promote the public morals and in a broad sense the public health and safety.

regard the mores of the era in which we live, intervening Federal decisions have overridden any intended desire to control contraceptive information as obscenity. The recent exception for married persons eliminates the propagation of a "virile and virtuous race" as a likely legislative purpose. In the case of *Commonwealth* v. *Corbett*, 307 Mass. 7, 8-9, this court rejected as a legislative purpose of § 21 the punishment of illicit sexual intercourse. Although in that case reference was made to the "spread[ing] unchecked" of venereal disease, we should also reject the thesis that "the Legislature intended pregnancy . . . to serve either as a restraint upon illicit affairs or as punishment for them." *State* v. *Baird*, 50 N. J. 376, 383. I am not convinced that the Legislature intended to risk the undesirable effects of an unwanted pregnancy. See U. Anderson and others, The Medical, Social, and Educational Implications of the Increase of Out-of-Wedlock Births, 56 Am. J. Pub. Health, p. 1866 (1966); U. S. Bureau of Public Assistance, Illegitimacy and Its Impact on the Aid to Dependent Children Program (1960); Fox, Abortion Deaths in California, 98 Am. J. Obstet. & Gync. p. 645 (1967). The serious risk of an undesired pregnancy and the unwanted child, disastrous alike to the married as to the unmarried parents and to society as a whole, is utterly disproportionate in harm to any slight public benefit to be gained from a probably ineffective attempt to discourage fornication. It seems to me that § 21 arbitrarily and capriciously affects individual liberties and freedom of behavior and bears no "reasonable relation to some purpose within the competency of the State." See *Sperry & Hutchinson Co.* v. *Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418; *Mansfield*

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Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." *Commonwealth* v. *Allison*, *supra*, at 62.

*Beauty Academy, Inc.* v. *Board of Registration of Hairdressers,* 326 Mass. 624, 627; *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health,* 348 Mass. 414, 422-425; *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400; *Griswold* v. *Connecticut,* 381 U. S. 479, 485.

Third, even if I were not concerned with the two previous points discussed, I am convinced that the question of distribution cannot be severed from the other provision of § 21 which the majority agree is unconstitutional. See *Pedlosky* v. *Massachusetts Inst. of Technology,* 352 Mass. 127. I am not satisfied that the "only word which is affected by . . . [the majority] opinion is 'exhibits' as it applies to the defendant in giving the lecture." As used in the section, the word is "vague and uncertain" (see *Herndon* v. *Lowry,* 301 U. S. 242, 259) and has a "chilling effect upon the exercise of First Amendment rights." See *Dombrowski* v. *Pfister* 380 U. S. 479, 487, 490-492. In addition, I think that the opinion casts grave doubts on the constitutionality of the portions of § 21 which prohibit advertising and printing, to say nothing of its effect on § 20 as it relates to contraceptive devices. Furthermore, the distinction drawn by the Legislature between married and unmarried persons is of questionable validity. Such a distinction cannot be read out of the statute. Cf. *Commonwealth* v. *Gardner,* 300 Mass. 372, 377. Even without the distinction the original purposes of § 21 can no longer be carried out by the section as amended by the Legislature and interpreted by this court. Its scope of application is indefinite and vague (see *Alegata* v. *Commonwealth,* 353 Mass. 287) and is a "hodgepodge" of uncertainties. See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695.

I am impelled to conclude that § 21 is incapable of being cut into segments which would be constitutionally valid without, in effect, performing judicial surgery.

*Joseph J. Balliro* for the defendant.

*Joseph R. Nolan*, Assistant District Attorney, for the Commonwealth.

*Roger P. Stokey, Henry Herrmann & Robert S. Bowditch, Jr.*, for Planned Parenthood League of Massachusetts, amicus curiae, submitted a brief.

*Robert B. Kent*, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

*David S. Fitzpatrick & Alexander B. Grannis*, of New York, for The National Emergency Civil Liberties Committee, amicus curiae, submitted a brief.

WILLIAM R. BAIRD,
*Petitioner*
*v.*
THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASACHUSETTS,
*Respondent*

Misc. Civ. No. 70-16
UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS
310 F. Supp. 951 (1970)

JULIAN, District Judge.

William R. Baird, who is presently in the custody of the respondent serving a three-month sentence imposed by the Massachusetts courts, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that he is in custody in violation of the Constitution of the United States.

The facts are briefly these: The petitioner, pursuant to invitation, addressed a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967. The address was approximately one hour in length and consisted of a discussion of various contraceptive devices, displayed with diagrams on two demonstration boards or contained in a cardboard box, and an exposition of their respective merits. During the address he stated that he was violating the statute and invited arrest. At the close the petitioner invited the members of the audience to come to the stage and to help themselves to the contraceptive articles. The petitioner personally handed to a young lady a package of Emko vaginal foam, an admittedly contraceptive substance. The petitioner was

thereupon arrested by a police officer and taken to police headquarters.

Petitioner was prosecuted and convicted in the Massachusetts Superior Court on two indictments charging violations of Mass. G.L. c. 272, § 21, one for unlawfully exhibiting certain articles for the prevention of conception, the other for unlawfully giving away an article for the prevention of conception. On appeal the Supreme Judicial Court reversed the conviction for exhibiting the articles,[1] but affirmed the conviction for giving away the article.[2] Petitioner was thereupon sentenced to imprisonment for the term of three months. On January 12, 1970, the Supreme Court of the United States denied certiorari. Baird v. Massachusetts, 369 U.S. 1029, 90 S.Ct. 580, 24 L.Ed.2d 524.

The material part of Mass. G.L. c. 272, § 21, as amended through St. 1966, c. 265, § 3, is:

> "Except as provided in section twenty-one A. whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away * * * any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion * * * shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

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[1] The Court found the display of the articles "essential to a graphic representation of his subject." It thereupon held that: "delivery of the lecture was an exercise of a right of free speech which has First Amendment protection. To the extent that Sec. 21 prohibits exhibiting, it is unconstitutional as applied to the defendant in this case."

[2] 247 N.E. 2d 574.

The exception in § 21 referring to § 21A was inserted by St. 1966, c. 265, § 3.[3] Section 21A was set forth in c 265, § 1 which reads in relevant part:

> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained."

The Supreme Judicial Court considered the effect of Griswold v. Connecticut, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, and of St. 1966, c. 265, upon § 21 and concluded that "[t]he *Griswold* case and the ensuing statutory amendments swept away the ground of decision in Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938), which upheld convictions of individuals who were charged with selling or giving contraceptives to married women even if 'intended to be used for the prevention of conception only upon prescription by a duly qualified physician when necessary for the preservation of life or health according to sound and generally accepted medical practice' (p. 374, 15 N.E.2d p. 223). They did not, however, repeal the prohibition against laymen furnishing information or providing contraceptives, and they did not enlarge the

[3] Chapter 265 of St. 1966 is entitled "An Act authorizing registered physicians or pharmacists to furnish drugs or articles for the prevention of pregnancy or conception."

group who might be so informed or thus provided. Unmarried individuals are still excluded. There is nothing in § 21 purporting to prohibit giving advice, discussing, or lecturing on the subject of contraceptives." This construction by the highest Court of Massachusetts is binding upon this Court, so that factually petitioner's conduct is clearly proscribed by statute. No showing was made either in the State courts or before this Court that petitioner has ever been a physician or pharmacist or was otherwise professionally qualified to prescribe or dispense contraceptives.

To support his position, petitioner presents several constitutional arguments: that the statute lacks a legitimate legislative purpose; that it infringes his right of free speech; that it is unconstitutionally vague; that it is not severable; and that it violates a right of privacy.

Considering his arguments *seriatim*, the first question is whether there is a legitimate legislative purpose justifying the statute. On this issue the Supreme Judicial Court stated:

> "Since St.1879, c. 159, § 1, the public policy of this Commonwealth, as legislatively declared, has included a prohibition against distribution of articles for the prevention of conception. Not until the recent amendment by St.1966, c. 265, § 3, was any exception made in favor of doctors and others who by training or occupation might be deemed to have acquired a special qualification as distributors. The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences:
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> • • •
>
> "Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond

> legislative power. Unlike the legislation in Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 424-426, 204 N.E.2d 281, the prohibition in § 21, as applied to the defendant [petitioner] in this case, is directly related to a legitimate legislative purpose. The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient."

247 N.E.2d at 578. This Court accepts as valid and binding the construction placed upon § 21 by the State court.

Had § 21A authorized registered physicians to administer or prescribe contraceptives for unmarried as well as for married persons, the legal position of the petitioner would not have been in any way altered. Not being a physician he would still have been prohibited by § 21 from "giving away" the contraceptive.

A legislature has the constitutional power to limit the practice of medicine to qualified physicians. The statutes under attack deal with the distribution of contraceptive drugs and devices. It is a matter of common knowledge that contraceptive substances may have harmful effects on the health of those who use them and for that reason are still the subject of extensive medical research.[4] The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of members of the community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest.

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[4] In his Memorandum in support of the issuance of the writ the petitioner claims that the contraceptive substance he delivered to the young woman was "a safe and medically approved article." No such finding was made by the State courts; there is no basis in the record for such a finding by this Court.

Petitioner claims that the "giving away" of the contraceptive was constitutionally protected protest and speech. This Court, however, adopts the view taken by the Supreme Judicial Court that the bestowal of the contraceptive upon the young woman in the audience "added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment." This conclusion is in accord with recent pronouncements made by the Supreme Court of the United States in this area of constitutional law. Thus, in Cox v. Louisiana, 1965, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, the Court stated:

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. * * * We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., *supra*, 336 U.S. [490] at 502, 69 S.Ct. at 691, [93 L.Ed. 834], that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.'"

And again in United States v. O'Brien, 1968, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672:

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First

Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justfiied if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [Footnotes omitted.]

Sections 21 and 21A meet all these requirements. First, from the discussion above it should be clear that a legitimate purpose of the statute was to safeguard the health

of citizens, unmistakably a traditional police power objective. Second, prohibiting the "giving away" of contraceptives is manifestly "unrelated to the suppression of free expression." Finally, the restriction on alleged First Amendment freedoms is, at best incidental. The petitioner was not convicted for any beliefs or views that he espoused or urged upon others, nor for exercising his right of free speech or of assembly, nor for any intellectual, moral, or other opposition he may have expressed against the Massachusetts statutes in question. He stands convicted solely for "giving away" a certain contraceptive medicine or article in violation of § 21.

Petitioner next attacks the validity of § 21 on the ground that it has been so "eroded" during the past half century as to be now "constitutionally vague." Petitioner, however, overlooks the fact that § 21 was reconsidered and acted upon by the Massachusetts Legislature as recently as 1966, when it inserted § 21A and amended § 21 (St.1966, c. 265, §§ 1 and 3) in order to bring § 21 into compliance with the decision of the Supreme Court of the United States in *Griswold, supra,* which had been handed down in 1965. The statutory provisions, as amended by the legislature and construed by the Supreme Judicial Court, are sufficiently clear to provide ascertainable standards of conduct and do not curtail or inhibit the exercise of individual freedoms protected by the Constitution. Cf. Baggett v. Bullitt, 1964, 377 U.S. 360, 84 S.Ct. 1316, 12 L. Ed.2d 377. The statutes are not constitutionally vague.

Petitioner further contends that "the prohibition of distributing found in § 21 is not severable from invalid portions of the section." The several acts prohibited by § 21 are stated in the disjunctive. Exhibiting is a distinct concept from selling, lending or giving away; and the prohibition against exhibiting can be eliminated when it conflicts with the First Amendment right of free speech without im-

pairing the significance of the prohibition against selling, lending or giving away. The Supreme Judicial Court effectively disposes of the petitioner's contention as follows:

> "The only word which is affected by this opinion is 'exhibits' as it applies to the defendant in giving the lecture. It may be constitutional in its application to others. This does not render it doubtful whether the Legislature would enact the balance of the statute, as in Pedlosky v. Massachusetts Inst. of Technology, 352 Mass. 127, 224 N.E.2d 414. In contemplation of the history of the statute, both remote and recent, we do not believe that the Legislature would prefer to have the entire statute fall if under the First Amendment the word 'exhibits' cannot stand, nor do we believe that in that circumstance they would prefer to treat as innocuous the other acts set forth in § 21:—selling or lending or giving away or offering to sell, lend or give away any of the prohibited articles."

247 N.E.2d at 579. This Court adopts this position.

Petitioner's remaining contentions is that the prohibition in § 21 against the giving away of contraceptives violates "the right of privacy." For this proposition he relies on *Griswold, supra.* In *Griswold* it was held that a Connecticut statute forbidding the *use* of contraceptives violated the right of marital privacy which is fundamental and basic and within the "penumbra" of specific guarantees of the Bill of Rights. "Marriage," observes the Court, "is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486, 85 S.Ct. at 1682. The Court further held that the appellants, who were physicians and prosecuted for giving medical advice to married persons as to the means of preventing conception, had standing to assert the constitutional rights of the married people with whom they had a professional relationship. The use

of contraceptives by married persons is not prohibited by any Massachusetts statute, and their distribution to such persons by registered physicians and pharmacists is authorized by § 21A. No violation of the right of marital privacy is involved in this case.

There is no statute in Massachusetts which makes it a crime for an unmarried person to *use* a contraceptive. Section 21, read with § 21A, however, prohibits everyone in Massachusetts, including registered physicians and pharmacists, from distributing contraceptives to unmarried persons. Another statute, Mass. G.L. c. 272, § 18, prohibits sexual intercourse between a man and an unmarried woman. The constitutionality of the latter statute is not challenged and was not litigated in the State court or in this Court.

Except as stated in the following quotation from page 3 of his Memorandum, petitioner does not specify what or whose right of privacy is being violated with reference to unmarried persons:

> "We are talking here not of the right to fornicate, not of the right to commit incest or adultery, nor of the right to be unchaste * * *; several laws exist for the prevention of these acts which are not in issue in this case. Instead, we are talking of the right of the individual to control his or her most private bodily functions."

The commission of fornication, incest or adultery necessarily involves the "most private bodily functions." All three acts are crimes under Massachusetts statutes, Mass. G.L. c. 272, §§ 14, 17 and 18. It has never been held, nor does petitioner suggest that it is beyond the constitutional powers of the State to punish such conduct as criminal. Nor has it ever been held that a constitutional right of

privacy shields acts of adultery, incest or fornication against intrusion by the State.

This Court, however, need not decide whether §§ 21 and 21A as construed by the Supreme Judicial Court violate some constitutional right of registered physicians in their professional relationship with unmarried patients, or of unmarried persons themselves. These questions are not presented by the facts in this case. The petitioner is not a physician and has no express or implied authority to act for physician. It does not appear that he himself is an unmarried person or has any professional or other legally significant relationship to unmarried persons. Therefore he lacks standing to assert the consistitutional rights of either group.

Petitioner would have standing if a violation of his own right of privacy were involved; but in the circumstances of this case his prosecution for distributing a contraceptive substance to a person with whom he had no legally significant relationship is not an invasion of any right of privacy he can properly claim as his own.

This Court agrees with the holding of the Supreme Judicial Court that § 21 is constitutional as construed by that Court and as applied to the petitioner in the case for unlawfully giving away an article for the prevention of conception.

The Court finds and rules that the petitioner is not in custody in violation of the Constitution and laws of the United States. Therefore, in accordance with the provisions of 28 U.S.C. § 2254(a), the petition is dismissed.

# United States Court of Appeals for the First Circuit.

No. 7578.

WILLIAM R. BAIRD,
PETITIONER, APPELLANT,
*v.*
THOMAS S. EISENSTADT,
As he is Sheriff of
Suffolk County, Massachusetts,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

July 6, 1970.

ALDRICH, *Chief Judge*. Petitioner Baird brings this petition for habeas corpus to attack his conviction for violation of Mass. G. L. c. 272, § 21, *Commonwealth* v. *Baird*, 1969 Mass. A. S. 727, *cert. denied* 396 U.S. 1029, hereinafter *Baird*, on the ground that the statute, insofar as it is directed against contraceptives, is unconstitutional. The facts are these. In April 1967 petitioner, pursuant to an

invitation, addressed a group of students at Boston University on the subject of contraception. On a demonstration board he exhibited various contraceptive devices, and at the close of his talk he invited members of the audience to come and help themselves. He personally handed to an unmarried adult woman a package of vaginal foam, a publicly advertised contraceptive. He was thereupon arrested and charged with a) exhibiting, and b) delivering, a contraceptive article.[1]

Following a trial, and a finding of guilty on both counts, the Superior Court pursuant to a Massachusetts procedural statute requested review by the Supreme Judicial Court of the constitutionality of the statute. That court unanimously held that the conviction for exhibiting contraceptive articles violated petitioner's First Amendment rights. By a 4-3 majority it upheld the constitutionality of the provision against delivery, holding *inter alia*, that this went beyond free speech, and that the statutory proscriptions were severable. The court ruled that forbid-

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[1] The statute, which contains a second section as the result of a 1966 amendment, reads as follows.

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion . . . shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and a half years or by a fine of not less than one hundred nor more than one thousand dollars." (§ 21).

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. . . ." (§ 21A).

Concededly petitioner was neither a physician nor a pharmacist.

ding delivery of contraceptive articles was supportable as a legitimate protection of public health. Significantly, the majority said nothing on the subject of morals. Nor did the court address itself to the question why a married woman's health was to be protected by requiring medical assistance, and an unmarried woman's by denying it, a question more pressingly raised in *Sturgis* v. *Attorney General*, post.

The petition for habeas corpus was dismissed by the district court, with opinion. 310 F.Supp. 951. We issued a certificate of probable cause for appeal, and ordered petitioner released on bail.

Petitioner attacks the statute on a number of grounds. The first two need not detain us. His extensive argument that the First Amendment entitled him to deliver a contraceptive article as 'symbolic speech" is less persuasive than the defendant's claim in *United States* v. *O'Brien* that he could emphasize an anti-war speech by burning his draft card. Even there the Supreme Court, as well as, in this respect, ourselves, was unimpressed by the argument that the right of free speech justifies the performance of an act which has been reasonably prohibited on independent substantive grounds. *United States* v. *O'Brien*, 1968, 391 U.S. 367. Equally unsupportable is the contention that the elimination of a small part of the statute, the provision against exhibition, destroys the statute as a whole. This is not an instance of judicial excision making the remainder difficult to interpret. Nor is this one of those "rarest of cases" where the statute has been so reduced in scope as to leave it pointless. *See United States* v. *Raines*, 1960, 362 U.S. 17, 23. The excision argument did not persuade the Massachusetts court, whose interpretation of the statute controls; nor does it us.

Petitioner's more substantive claims need considerable rephrasing. The issue before us is whether the statute

"bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Sperry & Hutchinson Co.* v. *Director*, 1940, 307 Mass. 408, 418. Or, in the Commonwealth's words, it must be shown that the statute "does not bear a reasonable relationship to a proper legislative purpose, or . . . is . . . arbitrary and discriminatory." *Nebbia* v. *New York*, 1934, 291 U.S. 502, 537; *Meyer* v. *Nebraska*, 1923, 262 U.S. 390, 399-400.

The Commonwealth asserts two general purposes, health and morals. In resting its decision on the former the court said in *Baird*,

> "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent contraception which may have undesirable, if not dangerous, physical consequences." 1969 Mass. A.S. at 733.

More recently the court had occasion to expand upon this statement. In *Sturgis* v. *Attorney General*, 1970 Mass. A.S. ———, (6/29/70), plaintiffs, two qualified physicians specializing in gynecology, sought under Massachusetts practice a declaratory judgment that the statute is unconstitutional in that it prevents them from furnishing contraceptive assistance to their unmarried patients. The court, Justices Cutter and Spiegel dissenting as to the outcome, stated,

> "The Legislature is free to conclude that some harm may conceivably attend the employment of contraceptives devices . . . . [Hence] the prohibition against their distribution bears a real and substantial relation to the legislative purpose."

The court went on to say that *Griswold v. Connecticut*, 1965, 381 U.S. 479, post, affirmed "beyond doubt" the right

of the state "to enact statutes regulating the private sexual lives of single persons."[2] The court, accordingly, upheld the statute in its full scope, as "protecting the public health."

While we agree with the generality of these observations as statements of principle, we are unable to find the statute to be an application thereof. Alternatively, if it could be thought to be intended for a proper purpose, we could not find, in the words of the Commonwealth quoted earlier, that it bears "a reasonable relationship" thereto, but, rather, we would find it "arbitrary and discriminatory." We reach these conclusions both because of the statute's total exclusion of the unmarried, and because of its palpable overbreadth with respect to the married.

So far as health is concerned, as Justices Whittemore and Cutter, dissenting in *Baird*, pointed out, "If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons." 1969 Mass. A.S. at 738. But not only are their needs the same, their physical characteristics, and their individual responses to contraceptives must be the same. The court's quoted statement in *Sturgis* that the "prohibition against . . . distribution bears a real and substantial relation to the legislative purpose" is, with due respect, beside the mark, if the purpose is health. The court neglects the fact that the legislature has recognized that health does not require prohibition; a physician may safely prescribe for married persons. If the prohibition which the court supports is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to pro-

[2] We note in passing that *Griswold*, in our opinion, in no way establishes "beyond doubt" that the present statute is constitutional. Even the statement on which the court relied came from the concurring opinion of a single justice. (381 U.S. at 498.)

tect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality. For reasons we will come to, we do not believe that health is the legislative purpose, but if it is, the statute is arbitrary, and by the same token, grossly discriminatory.

In addition, we must take notice that not all contraceptive devices risk "undesirable . . . [or] dangerous physical consequences." It is 20 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a "redingote anglais." The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless.

In this posture it is imposible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married. If there could be any doubts, it is to be noted that health protection, even for the married, had no place prior to the 1966 amendment. The legislature intended just the opposite. Consistent with the fact that the statute was contained in a chapter dealing with "Crimes Against Chastity, Morality, Decency and Good Order," it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. *Commonwealth* v. *Gardner,* 1938, 300 Mass. 372. The court in Baird gave the reason for the change.

"The amendments made by St. 1966, c. 265 [Section 21A, n. 1, ante] were brought about by the decision in *Griswold* v. *Connecticut*, 381 U.S. 479, which held unconstitutional as applied to married persons a statute prohibiting the use of contraceptives and the giving of advice on the subject." 355 Mass. at 748. On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling.

Turning to the second contention, that the statute has a legitimate purpose to protect morals, the Commonwealth argues that lack of access to contraceptive materials will have a deterrent effect upon the commission of fornication, viz., sexual intercouse between consenting, unmarried adults. Fornication is a misdemeanor, entailing a thirty dollar fine, or three months in jail. Mass. G.L. c. 272 § 18. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor. Here, again, we look to history. If the prevention of fornication was the true statutory aim, there never was a reason to deny access to contraceptive materials to married persons. Yet, as we have noted, until *Giswold* the married as well as the unmarried were equally proscribed. We are led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration.

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible ob-

ligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state. See the various opinions in *Griswold* v. *Connecticut*, ante, particularly those of Mr. Justice Harlan and Mr. Justice White, concurring. *See also Richards* v. *Thurston*, 1 Cir., 4/28/70.

To preserve the statute as one directed towards health would necessitate judicial excision of the expressed distinction between unmarried and married users. Even then, there would be difficulties. Deletion of unsupportable overbreadth, encompassing articles not reasonably believed dangerous to health, would leave the statute with an element of vagueness, a burden we would be reluctant to impose upon the fundamental rights at stake here. *Aptheker* v. *Secretary of State*, 1964, 378 U.S. 500, 515-17; *see Bouie* v. *City of Columbia*, 1964, 378 U.S. 347, 362. Where the statute, prior to its amendment, advanced no constitutionally permissible objective, and the amendment revealed no purpose except to preserve as much of the statute as possible in the face of supervening judicial authority, we must conclude that any finding of proper purpose would be mere pretense. *Cf. Ho Ah Kow* v. *Nunan*, C.C.Cal., 1879, 5 Sawyer 552, 12 Fed. Cas. 252. We see no basis for a presumption in the statute's favor, *see United States* v. *O'Brien*, 1968, 391 U.S. 367, 383; *Goesaert* v. *Cleary*, 1948, 335 U.S. 464, or any reason why we should interpret it or attempt to remold it to achieve some other, legitimate objective.[8]

[8] For a discussion of presumptions of permissible purpose see Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887 (1970), centering around *United States* v. *O'Brien*, ante. It is true that in *O'Brien* the Court refused to invalidate a statute on the basis of an allegation of improper purpose based in part on what occurred on the floor of Congress during its passage. In *O'Brien* the Court pointed out

In so holding we in no way suggest that the legislature may not enact a statute appropriately directed toward the protection of health, to guard married and unmarried persons alike. We observe further, that if the legislature is truly concerned with deterring fornication, it may increase the statutory penalty to mark the measure of its concern. It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy.

Finally, the Commonwealth says that petitioner has not shown that his own constitutional rights have been violated, and therefore that he has no standing to attack the statute. If only some application of the statute were constitutionally unwarranted, there might be merit in this position. We, however, have held the statute itself void. Petitioner is being jailed for a direct violation of that statute; he must have as much standing to protest as anyone else. In this connection we observe that by criticizing him for not seeking declaratory relief instead of acting so as to invite arrest, the Massachusetts court implicitly recognized petitioner's standing and interest. 355 Mass. at 755. We will do no less. The order of the District Court is vacated, and the action remanded thereto with instructions to grant the writ discharging the petitioner.

SUPREME JUDICIAL COURT OF MASSACHUSETTS
Mass. Adv. Sh. (1970) 1139.

SOMERS H. STURGIS & another *vs.* ATTORNEY GENERAL.

REARDON, J. The plaintiffs filed a bill for declaratory relief in the county court to determine the validity of

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that the statute was constitutional on its face. The present statute is not, and cannot be legitimized without both excision and revision. Where such action on our part would have to be undertaken in the light of a statutorily demonstrated impermissible intent, we consider the *O'Brien* teaching to be inapposite.

G. L. c. 272, §§ 20, 21, and 21A. The parties submitted a statement of agreed facts. The single justice reserved and reported the case to the full court for such decree as may be entered under G. L. c. 231A. The facts in part are as follows.

The plaintiffs are registered physicians licensed to practice in Massachusetts, and are specialists in the field of gynecology, "trained and competent in the use of recognized drugs and articles used for the prevention of pregnancy." In the past each plaintiff in the course of his medical practice and in the exercise of his best medical judgment has administered to, and prescribed for, married patients drugs and articles intended for the prevention of pregnancy or conception. It has been, is, and will be each plaintiff's desire in the course of his medical practice and in the exercise of his best medical judgement to administer to, and prescribe for, certain unmarried patients drugs or articles intended for the prevention of pregnancy or conception. Each is of the medical opinion that sound medical practice calls for such action. Each plaintiff has been advised that G. L. c. 272, § 20, as amended by St. 1966, c. 265, § 2; § 21, as amended by St. 1966, c. 265, § 3; and 21A, inserted by St. 1966, c. 265, § 1,[1] make it illegal for him to

[1] "Section 20. Except as provided in section twenty-one A, whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child or of preventing, or which is represented as intended to prevent, pregnancy shall be punished by imprisonment in the state prison for not more than

administer to, or to prescribe for, any unmarried patient such drugs and articles, and make it illegal for any registered pharmacist to fill a prescription for such a patient. Each plaintiff has been advised that if he should administer to or prescribe such durgs or articles for an unmarried patient he could be arrested, prosecuted and convicted under G. L. c. 272, §§ 20, 21, and 21A, and sentenced for up to five years in the State prison and have his licence to practise medicine indefinitely suspended by the Massachusetts Board of Registration in Medicine.

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three years or in jail for not more than two and one half years or by a fine of not more than one thousand dollars.

"Section 21. Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.

"Section 21A. A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

The defendant Attorney General is responsible for enforcing the laws of the Commonwealth, and under authority granted to him proposes to enforce G. L. c. 272, §§ 20, 21, and 21A.

The plaintiffs argue that they are engaged in a profession under the protection of the Fourteenth Amendment to the Constitution of the United States and arts. 1, 10 and 12 of the Massachusetts Bill of Rights. They allege that any exercise of the police powers which infringes on their constitutional rights "must have a 'real and substantial relation' to the general welfare." They state that the statutory provisions under attack are unrelated to the statutory purpose and interfere both with their right to carry on a profession and their duty to care for their patients in derogation of the Fourteenth Amendment to the Constitution of the United States and the stated articles of the Massachusetts Bill of Rights. They further allege the statutes to be invalid in that they discriminate against the indigent.

The Attorney General argues the Commonwealth's ability to prohibit distribution of birth control devices to the unmarried on the ground that the Commonwealth is entitled to protect the health and welfare of its citizens, and also argues that new research in the filed cited at the hearings before a United States Senate subcommittee in January, 1970, indicated the potential danger of contraceptives in causing long range mutagenic and carcinogenic side effects. Reference was made to conflicting medical testimony between experts on the subject. It is on the basis of this Senate testimony that the Attorney General further argues that the prohibition against distribution of birth control devices to single persons is reasonably related to the public health and welfare. The Attorney General refers to *Sperry & Hutchinson Co.* v. *Director of the Div. on the Necessaries of Life,* 307 Mass. 408, 418, where we said, "Unless the act of the Legislature cannot be supported upon any rational

basis of fact that reasonably can be conceived to sustain it, the court has no power to strike it down as violative of the Constitution." We further test the legislation on the basis that "[a]ll rational presumptions are made in favor of the validity of every legislative enactment. Enforcement is to be refused only when it is in manifest excess of legislative power." *Commonwealth* v. *Finnegan*, 326 Mass. 378, 379. Furthermore, as we stated in *Commonwealth* v. *Leis*, 355 Mass. 189, 192, "We know of nothing that *compels* the Legislature to thoroughly investigate the available scientific and medical evidence when enacting a law. . . . The Legislature is presumed to have acted rationally and reasonably." The current case raises questions resembling those discussed in *Commonwealth* v. *Leis, supra*. The questionable safety of birth control devices is earnestly argued by the Attorney General. "That there may be an earnest conflict of serious opinion does not suffice to bring matters of legislative judgment within the range of judicial cognizance." *Commonwealth* v. *Leis*, 355 Mass. 189, 201, Kirk, J., concurring. In short, the Legislature is free to conclude that some harm may conceivably attend the employment of contraceptive devices. If such be so, the prohibition against their distribution bears a real and substantial relation to the legislative purpose. We are aware that it may well be that certain contraceptive medication and devices constitute no hazard to health, in which event it could be argued that the statute swept too broadly in its prohibition.

This is, however, a second and more compelling ground for upholding the statute. The plaintiffs argue that the statutory provisions, following in the wake of *Griswold* v. *Connecticut*, 381 U. S. 479, that the plaintiffs can treat married but not unmarried patients are anomalous on their face. There can be no doubt that the enforcement of the statute does create certain factual situations which at best

can be described as unhappy. However, the *Griswold* case is based on the right of privacy "surrounding the marriage relationship." *Griswold* v. *Connecticut, supra,* at 486. The Supreme Court of the United States found the Connecticut statute too broad in scope and thus restricted the Legislature from interdicting distribution of birth control devices to married persons. However, the *Griswold* case, as the Attorney General argues, affirmed "beyond doubt" the right of the State of Connecticut to enact statutes regulating the private sexual lives of single persons, stating that the discouraging of extra-marital relations is "admittedly a legitimate subject of state concern" and that the statutes within the basic purpose "of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.' " *Griswold* v. *Connecticut, supra,* at 498, Goldberg, J., concurring. We referred to this language in *Commonwealth* v. *Baird,* 355 Mass. 746, 749, when we stated that the *Griswold* case and the ensuing statutory amendments in Massachusetts brought about by the *Griswold* case "did not . . . repeal the prohibition against laymen furnishing information or providing contraceptives, *and they did not enlarge the group who might be so informed or thus provided. Unmarried individuals are still excluded"* (emphasis supplied).

To the argument which is made to us that prohibition against the distribution of birth control devices violates the rights of a physician to toil in his profession, we can only say that such well recognized right as does exist is constantly subject to those laws and regulations which have the design of protecting the public health by any rational means. *Lawrence* v. *Board of Registration in Medicine,* 239 Mass. 424, 428. The physician's obligation to his conscience and to his profession is entirely consonant with his obligation also to abide appropriate regulation imposed by the body politic in the public interest.

To the argument that the statutes complained of are discriminatory in that they deny equal treatment to the poor, we find the record devoid of facts to overcome the presumption that the statute in fact deals fairly with the poorer elements of the population. Simple unsupported assertion is not enough in our opinion to invalidate the statute on this ground.

In short, the plaintiffs have brought a suit dealing with highly debated matters which are not to be decided on personal judicial predeliction. Our function is to determine whether in accord with art. 30 of the Declaration of Rights of our own Constitution dealing with the separation of powers, and in accord with other constitutional requirements to whcih allusion has been made, the Legislature has properly acted in passing the statutes on which there is complaint. For the reasons which we have assigned above we cannot say that G. L. c. 272, §§ 20, 21, and 21A, are unconstitutional, and it remains only to point out that the proper forum for the plaintiffs' case is the General Court, not here.

A decree is to be entered declaring that G. L. c. 272, §§ 20, 21, and 21A, are constitutional in so far as they forbid a registered physician to administer contraceptives to or prescribe them for unmarried persons, and forbid a registered pharmacist to fill prescriptions for contraceptives for unmarried persons.

*So ordered.*

CUTTER, J. and SPIEGEL, J. (dissenting). We do not agree with the opinion. In general our views on the broad aspects of the question of birth control assitance for unmarried persons have been stated in our dissenting opinions in *Commonwealth* v. *Baird*, 355 Mass. 746, 758, 761. In accordance with those views we would hold unconstitutional these statutes which make it a felony for even highly qualified doctors, in the exercise of professional judgment, to

prescribe contraceptive drugs or devices for unmarried patients.

*Roger P. Stokey* (*Stephen M. Weiner* with him) for the plaintiffs.

*Robert J. Condlin*, Deputy Assistant Attorney General (*Walter H. Mayo, III*, Assistant Attorney General, with him), for the Attorney General.

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# Supreme Court of the United States.

OCTOBER TERM, 1970.

No. ~~8041~~ 70-17

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
*Appellant,*
*v.*
WILLIAM R. BAIRD,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## JURISDICTIONAL STATEMENT.

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# Supreme Court of the United States.

OCTOBER TERM, 1970.

No.

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
*Appellant,*
*v.*
WILLIAM R. BAIRD,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## JURISDICTIONAL STATEMENT.

The appellant, the Sheriff of Suffolk County, Massachusetts, submits this statement pursuant to the provisions of Rule 15 of the Rules of this Court in support of his contention that this Court has jurisdiction to review the judgment and order of the United States Court of Appeals for the First Circuit referred to herein.

### The Opinions Below.

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at F. 2d (No.

7578, 1st Cir. July 6, 1970). The opinion of the District Court is reported at 310 F. Supp. 951 (1970). The opinion of the Massachusetts Supreme Judicial Court is reported at 1969 Mass. Adv. Sh. 727, 247 N.E. 2d 574 (1969). The opinions and judgments of the Courts herein referred to are reproduced as appendices to this statement.

## Jurisdiction.

The civil action in the United States District Court for the District of Massachusetts was commenced by the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. After hearing, the Court dismissed the petition. Thereupon, the plaintiff (appellee herein) appealed to the United States Circuit Court of Appeals for the First Circuit. After hearing, that Court vacated the order of the District Court and remanded the action thereto with instruction to grant the writ of habeas corpus on July 6, 1970. A timely notice of appeal was filed with the Court of Appeals for the First Circuit on July 15, 1970.

The statutory provision believed to confer jurisdiction of the appeal on this court is 28 U.S.C. § 1254 (2).

## Statutes Involved.

The Massachusetts statutes involved are: Mass. G.L. c. 272, § 21, as amended by Acts of 1966, chapter 265, § 3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or ad-

vertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

The text of this statute is found at pages 159-160, 1969 Pocket Part, Volume 44, Mass. General Laws Annotated (West Publishing Company).

And Mass. G.L, c. 272, § 21A, as inserted by Acts of 1966, c. 265, § 1, which provides:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

The text of the statute is found at page 160, 1969 Pocket Part, Volume 44, Mass. General Laws Annotated (West Publishing Company).

## Questions Presented.

Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional on its face as vague, arbitrary, discriminatory, overbroad, or lacking legitimate legislative purpose to the extent that it makes unlawful to give away to unmarried persons medicines and other articles for the prevention of conception?

Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional as applied to the appellee, William R. Baird, who, not being a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse, was convicted for giving away certain contraceptive devices, to wit: vaginal foam, at a public lecture before an audience of approximately two thousand persons at Boston University?

## Statement of the Case.

In April 1967, William R. Baird, the appellee herein, pursuant to an invitation, addressed a group of students at Boston University. On a demonstration board he exhibited various contraceptive devices and at the close of his lecture he invited members of the audience to come and help themselves. He personally handed an unmarried adult woman a package of vaginal foam. He was thereupon arrested and charged with exhibiting and delivering a contraceptive article. The appellee was indicted and convicted of exhibiting and distributing contraceptive devices in violation of Mass. G.L. c. 272, § 21. On appeal, the Massachusetts

Supreme Judicial Court unanimously held that the conviction for exhibiting contraceptive articles violated Mr. Baird's First Amendment rights. But by a 4-3 majority, the Court upheld the constitutionality of the provision against delivering as beyond the realm of free speech. *Commonwealth* v. *Baird*, Mass. Adv. Sh. (1969) 727 (May 1, 1969). On January 12, 1970, the United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts*, 90 S.Ct. 580 (1970). Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the District of Massachusetts. Following a hearing, the petition was dismissed with opinion. *Baird* v. *Eisenstadt*, 310 F. Supp. 951 (1970). A claim of appeal having been filed, the United States Court of Appeals for the First Circuit issued a certificate of probable cause and ordered the appellee herein released on bail. After a hearing, the Court of Appeals entered a judgment vacating the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus discharging Mr. Baird, *Baird* v. *Eisenstadt*, No. 7578 (1st Cir. July 6, 1970), and this appeal followed.

## The Questions are Substantial.

### A. G.L. C. 272, § 21, is a Valid Exercise of the Police Power.

Since 1879, when the Massachusetts Legislature enacted this statute* it has been a crime to distribute contraceptives. This statute was enacted under the police powers of the state and represents a law within this power to protect both morals and health. It is fatuous to argue that a law

* G.L. c. 272, § 21A, was enacted in 1966.

limiting distribution of contraceptives to the married does not bear a reasonable relationship to morals. The success or lack of success which such law has on the protection of morals should not be the measure of its constitutionality.

What radical change has occurred in the society in which we live to make such a law now unconstitutional? Have people acquired rights to extra-marital relations free of any public and criminal responsibility? If so, what becomes of our laws against fornication and adultery?

The Massachusetts Supreme Judicial Court said in *Commonwealth* v. *Allison*, 227 Mass. 57 (1917) at p. 62:

> "The statutes under which the several counts in this indictment are drawn contravene no provision of the constitution. Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sactity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the State."

Nothing relevant to this issue has occurred since 1917 to change the legislative purposes as delineated in *Commonwealth* v. *Allison, supra*. This statute is still designed "to promote public morals." Its purpose in protecting purity and chastity, is still viable in 1970 and even perhaps much more necessary than in 1917.

The Court below has adopted the specious argument of Baird that there is some "right" of the unmarried to have sexual intercourse free of unwanted pregnancy. Such a right does *not* exist except by an attempted judicial fiat. *Poe* v. *Ullman*, 367 U.S. 497, 553.

If such right exists, then our laws punishing fornication and adultery are necessarily unconstitutional. The case of *Griswold* v. *Connecticut*, 381 U.S. 479, at 498, acknowledges as "beyond doubt" the right of the state "to enact statutes regulating the private sexual lives of single persons."

The presumption of validity in favor of the statute places the burden on Baird to demonstrate its unconstitutionality. While Baird frequently refers to the rising rate of illegitimacy, he is conspicuously silent on statistics which might prove that the free and lawful distribution of contraceptives has reduced the rate of illegitimacy in those states which permit such distribution. The burden is his, not ours. In a word, Baird has failed to show that the statute does *not* bear a reasonable relationship to a proper object of legislative concern.

Furthermore, if sociological or economic changes have occurred with the passage of time making it desirable to take a "second look" at the problems, this is a function of the legislature. As Mr. Justice Black said in *Griswold* at p. 513, "... I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious, or unreasonable, or accomplishes no justifiable purpose or is offensive to our notions of 'civilized standards of conduct.' Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them."

*Griswold* lends no support to Baird's position because (1) *Griswold* dealt only with the *use*, not distribution, of contraceptives, (2) to married people only, (3) by a licensed physician. Baird argues for distribution to the unmarried, by anyone whether a licensed physician or an ordinary lay person. This tripartite distinction renders *Griswold* inapposite.

Moreover, the statute bears a direct relationship to the health of its citizens. As District Court Judge Julian in his opinion said:

> "A legislature has the constitutional power to limit the practice of medicine to qualified physicians. The statutes under attack deal with the distribution of contraceptive drugs and devices. It is a matter of common knowledge that contraceptive substances may have harmful effects on the health of those who use them and for that reason are still the subject of extensive medical research. The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of members of the community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest."

The Court below attempted to ridicule the "health argument" by asserting the "right" of the unmarried to the same professional assistance of physicians as afforded the married, and by characterizing the denial of professional help to the unmarried, "grossly discriminatory." This argument is fallacious because it is predicated on the totally untenable grounds that the unmarried have a "right" to indulge in the act of sexual intercourse which creates the need for professional contraceptive advice. This right just does not exist.

One might think after reading the opinion of the Court below that an unmarried person required this type of professional advice and service, as a result of accidentally contracting typhoid fever or diphtheria. It becomes important to remind ourselves that an unmarried person needs this type of professional advice only if he violates or contemplates the violation of the law.

### B. Baird Has No Standing.

Baird argues the invasion of a fundamental right, a right of privacy of sorts. However, Baird is not a licensed physician nor does he enjoy any recognized professional or confidential relationship to any person. He is admittedly a married man. He has no standing to assert a right of privacy belonging to an unspecified segment of the population of unmarried persons. *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217 (1912).

### C. The Assumption of Jurisdiction is Necessary.

Twenty-five states* have laws on contraception not entirely dissimilar to the Massachusetts statutes which are under review in this case. Baird has made no secret of the fact that he intends to continue to violate this statute. If arrested and prosecuted, Baird will necessarily seek the help of the Federal Court and succeed in preventing prosecution, leaving the Massachusetts authorities in a hopeless state of frustration.

Following the *Baird* case, the Massachusetts Supreme Judicial Court rendered its opinion in *Sturgis* v. *Attorney General*, Mass. Adv. Sh. (1970) 1139, 260 N.E. 2d 687 (June 29, 1970) again upholding the statute herein under review.

## Conclusion.

For all of the above reasons, we submit that the questions presented on appeal are substantial and of grave public importance. The constitutionality of this type of statute

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*Arizona, Arkansas, Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Washington, West Virginia, Wisconsin.

has never been decided by this Court. Accordingly we request that probable jurisdiction be noted and that the matter be set down for argument.

Respectfully submitted,

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DAVID P. TWOMEY,
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Suffolk County.

Appendix A.

# United States Court of Appeals
## For the First Circuit

No. 7578.

WILLIAM R. BAIRD,
PETITIONER, APPELLANT,
*v.*
THOMAS S. EISENSTADT,
As he is Sheriff of
Suffolk County, Massachusetts,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

*Chester C. Paris*, with whom *Joseph J. Balliro* was on brief, for appellant.

*Lawrence P. Cohen*, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, *Garrett H. Byrne*, District Attorney, Suffolk County, and *Joseph R. Nolan*, Assistant District Attorney, Suffolk County, were on brief, for appellee.

July 6, 1970.

ALDRICH, *Chief Judge*. Petitioner Baird brings this petition for habeas corpus to attack his conviction for violation of Mass. G. L. c. 272 § 21, *Commonwealth* v. *Baird*, 1969 Mass. A. S. 727, *cert. denied* 396 U.S. 1029, hereinafter *Baird*, on the ground that the statute, insofar as it is directed against contraceptives, is unconstitutional. The facts are these. In April 1967 petitioner, pursuant to an invitation, addressed a group of students at Boston Uni-

versity on the subject of contraception. On a demonstration board he exhibited various contraceptive devices, and at the close of his talk he invited members of the audience to come and help themselves. He personally handed to an unmarried adult woman a package of vaginal foam, a publicly advertised contraceptive. He was thereupon arrested and charged with a) exhibiting, and b) delivering, a contraceptive article.[1]

Following a trial, and a finding of guilty on both counts, the Superior Court pursuant to a Massachusetts procedural statute requested review by the Supreme Judicial Court of the constitutionality of the statute. That court unanimously held that the conviction for exhibiting contraceptive articles violated petitioner's First Amendment rights. By a 4-3 majority it upheld the constitutionality of the provision against delivery, holding, *inter alia*, that this went beyond free speech, and that the statutory proscriptions were severable. The court ruled that forbidding delivery of contraceptive articles was supportable as a legitimate protection of public health. Significantly, the majority said nothing on the subject of morals. Nor did

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[1] The statute, which contains a second section as the result of a 1966 amendment, reads as follows.

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away ... any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion ... shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars." (§21).
>
> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. ..." (§ 21A).

Concededly petitioner was neither a physician nor a pharmacist.

the court address itself to the question why a married woman's health was to be protected by requiring medical assistance, and an unmarried woman's by denying it, a question more pressingly raised in *Sturgis* v. *Attorney General*, post.

The petition for habeas corpus was dismissed by the district court, with opinion. 310 F.Supp. 951. We issued a certificate of probable cause for appeal, and ordered petitioner released on bail.

Petitioner attacks the statute on a number of grounds. The first two need not detain us. His extensive argument that the First Amendment entitled him to deliver a contraceptive article as "symbolic speech" is less persuasive than the defendant's claim in *United States* v. *O'Brien* that he could emphasize an anti-war speech by burning his draft card. Even there the Supreme Court, as well as, in this respect, ourselves, was unimpressed by the argument that the right of free speech justifies the performance of an act which has been reasonably prohibited on independent substantive grounds. *United States* v. *O'Brien*, 1968, 391 U.S. 367. Equally unsupportable is the contention that the elimination of a small part of the statute, the provision against exhibition, destroys the statute as a whole. This is not an instance of judicial excision making the remainder difficult to interpret. Nor is this one of those "rarest of cases" where the statute has been so reduced in scope as to leave it pointless. *See United States* v. *Raines*, 1960, 362 U.S. 17, 23. The excision argument did not persuade the Massachusetts court, whose interpretation of the statute controls; nor does it us.

Petitioner's more substantive claims need considerable rephrasing. The issue before us is whether the statute "bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Sperry & Hutchinson Co.* v. *Director*, 1940, 307

Mass. 408, 418. Or, in the Commonwealth's words, it must be shown that the statute "does not bear a reasonable relationship to a proper legislative purpose, or . . . is . . . arbitrary and discriminatory." *Nebbia* v. *New York*, 1934, 291 U.S. 502, 537; *Meyer* v. *Nebraska*, 1923, 262 U.S. 390, 399-400.

The Commonwealth asserts two general purposes, health and morals. In resting its decision on the former the court said in *Baird*,

> "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent contraception which may have undesirable, if not dangerous, physical consequences." 1969 Mass. A.S. at 733.

More recently the court had occasion to expand upon this statement. In *Sturgis* v. *Attorney General*, 1970 Mass. A.S. ———, (6/29/70), plaintiffs, two qualified physicians specializing in gynecology, sought under Massachusetts practice a declaratory judgment that the statute is unconstitutional in that it prevents them from furnishing contraceptive assistance to their unmarried patients. The court, Justices Cutter and Spiegel dissenting as to the outcome, stated,

> "The Legislature is free to conclude that some harm may conceivably attend the employment of contraceptives devices . . . . [Hence] the prohibition against their distribution bears a real and substantial relation to the legislative purpose."

The court went on to say that *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, post, affirmed "beyond doubt" the right of the state "to enact statutes regulating the private sexual lives of single persons."[2] The court, record-

[2] We note in passing that *Griswold*, in our opinion, in no way establishes "beyond doubt" that the present statute is constitutional. Even the statement on which the court relied came from the concurring opinion of a single justice. (381 U.S. at 498.)

ingly, upheld the statute in its full scope, as "protecting the public health."

While we agree with the generality of these observations as statements of principle, we are unable to find the statute to be an application thereof. Alternatively, if it could be thought to be intended for a proper purpose, we could not find, in the words of the Commonwealth quoted earlier, that it bears "a reasonable relationship" thereto, but, rather, we would find it "arbitrary and discriminatory." We reach these conclusions both because of the statute's total exclusion of the unmarried, and because of its palpable overbreadth with respect to the married.

So far as health is concerned, as Justices Whittemore and Cutter, dissenting in *Baird*, pointed out, "If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons." 1969 Mass. A.S. at 738. But not only are their needs the same, their physical characteristics, and their individual responses to contraceptives must be the same. The court's quoted statement in *Sturgis* that the "prohibition against . . . distribution bears a real and substantial relation to the legislative purpose" is, with due respect, beside the mark, if the purpose is health. The court neglects the fact that the legislature has recognized that health does not require prohibition: a physician may safely prescribe for married persons. If the prohibition which the court supports is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality. For reasons we will come to, we do not believe that health is the legislative purpose, but if it is, the statute is arbitrary, and by the same token, grossly discriminatory.

In addition, we must take notice that not all contraceptive devices risk "undesirable . . . [or] dangerous physical consequences." It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a "redingote anglais." The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless.

In this posture it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married. If there could be any doubts, it is to be noted that health protection, even for the married, had no place prior to the 1966 amendment. The legislature intended just the opposite. Consistent with the fact that the statute was contained in a chapter dealing with "Crimes Against Chastity, Morality, Decency and Good Order," it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. *Commonwealth* v. *Gardner*, 1938, 300 Mass. 372. The court in Baird gave the reason for the change. "The amendment made by St. 1966, c. 265 [Section 21A, n. 1, ante] were brought about by the decision in *Griswold* v. *Connecticut*, 381 U.S. 479, which held unconstitutional as applied to married persons a statute prohibiting the use of contraceptives and the giving of advice

on the subject." 1969 Mass. A.S. at 729. On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling.

Turning to the second contention, that the statute has a legitimate purpose to protect morals, the Commonwealth argues that lack of access to contraceptive materials will have a deterrent effect upon the commission of fornication, viz., sexual intercourse between consenting, unmarried adults. Fornication is a misdemeanor, entailing a thirty dollar fine, or three months in jail. Mass. G.L. c. 272 § 18. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor. Here, again, we look to history. If the prevention of fornication was the true statutory aim, there never was a reason to deny access to contraceptive materials to married persons. Yet, as we have noted, until *Griswold* the married as well as the unmarried were equally proscribed. We are led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral — to the extent that *Griswold* will permit such a declaration.

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider

that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state. See the various opinions in *Griswold* v. *Connecticut*, ante, particularly those of Mr. Justice Harlan and Mr. Justice White, concurring. *See also Richards* v. *Thurston*, 1 Cir., 4/28/70.

To preserve the statute as one directed towards health would necessitate judicial excision of the expressed distinction between unmarried and married users. Even then, there would be difficulties. Deletion of unsupportable overbreadth, encompassing articles not reasonably believed dangerous to health, would leave the statute with an element of vagueness, a burden we would be reluctant to impose upon the fundamental rights at stake here. *Aptheker* v. *Secretary of State*, 1964, 378 U.S. 500, 515-17; *see Bouie* v. *City of Columbia*, 1964, 378 U.S. 347, 362. Where the statute, prior to its amendment, advanced no constitutionally permissible objective, and the amendment revealed no purpose except to preserve as much of the statute as possible in the face of supervening judicial authority, we must conclude that any finding of proper purpose would be mere pretense. *Ct. Ho Ah Kow* v. *Nunan*, C.C.Cal., 1879, 5 Sawyer 552, 12 Fed. Cas. 252. We see no basis for a presumption in the statute's favor, *see United States* v. *O'Brien*, 1968, 391 U.S. 367, 383; *Goesaert* v. *Cleary*, 1948, 335 U.S. 464, or any reason why we should interpret it or attempt to remold it to achieve some other, legitimate objective.[3]

[3] For a discussion of presumptions of permissible purpose, see Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887 (1970), centering around *United States* v. *O'Brien*, ante. It is true that in *O'Brien* the Court refused to invalidate a statute on the basis of an allegation of improper purpose based in part on what occurred on the floor of Congress during its passage. In *O'Brien* the Court pointed out that the statute was constitutional on its face. The present statute is not, and cannot be legitimized without both excision and revi-

In so holding we in no way suggest that the legislature may not enact a statute appropriately directed toward the protection of health, to guard married and unmarried persons alike. We observe further, that if the legislature is truly concerned with deterring fornication, it may increase the statutory penalty to mark the measure of its concern. It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy.

Finally, the Commonwealth says that petitioner has not shown that his own constitutional rights have been violated, and therefore that he has no standing to attack the statute. If only some application of the statute were constitutionally unwarranted, there might be merit in this position. We, however, have held the statute itself void. Petitioner is being jailed for a direct violation of that statute; he must have as much standing to protest as anyone else. In this connection we observe that by criticizing him for not seeking declaratory relief instead of acting so as to invite arrest, the Massachusetts court implicitly recognized petitioner's standing and interest. 1969 Mass. A.S. at 735. We will do no less. The order of the District Court is vacated, and the action remanded thereto with instructions to grant the writ discharging the petitioner.

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sion. Where such action on our part would have to be undertaken in the light of a statutorily demonstrated impermissible intent, we consider the *O'Brien* teaching to be inapposite.

## Appendix B.

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WILLIAM R. BAIRD,
*Petitioner*
*v.*
THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
*Respondent*

Misc. Civ. No. 70-16
UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS
310 F. Supp. 951 (1970)

JULIAN, District Judge.

William R. Baird, who is presently in the custody of the respondent serving a three-month sentence imposed by the Massachusetts courts, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that he is in custody in violation of the Constitution of the United States.

The facts are briefly these: The petitioner, pursuant to invitation, addressed a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967. The address was approximately one hour in length and consisted of a discussion of various contraceptive devices, displayed with diagrams on two demonstration boards or contained in a cardboard box, and an exposition of their respective merits. During the address he stated that he was violating the statute and invited arrest. At the close the petitioner invited the members of the audience to come to the stage and to help themselves to the contraceptive articles. The petitioner personally handed to a young lady a package of Emko vaginal foam,

an admittedly contraceptive substance. The petitioner was thereupon arrested by a police officer and taken to police headquarters.

Petitioner was prosecuted and convicted in the Massachusetts Superior Court on two indictments charging violations of Mass. G.L. c. 272, § 21, one for unlawfully exhibiting certain articles for the prevention of conception, the other for unlawfully giving away an article for the prevention of conception. On appeal the Supreme Judicial Court reversed the conviction for exhibiting the articles,[1] but affirmed the conviction for giving away the article.[2] Petitioner was thereupon sentenced to imprisonment for the term of three months. On January 12, 1970, the Supreme Court of the United States denied certiorari. Baird v. Massachusetts, 369 U.S. 1029, 90 S.Ct. 580, 24 L.Ed.2d 524

The material part of Mass. G.L. c. 272, § 21, as amended through St. 1966, c. 265, § 3, is:

> "Except as provided in section twenty-one A. whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away * * * any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion * * * shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

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[1] The Court found the display of the articles "essential to a graphic representation of his subject." It thereupon held that: "delivery of the lecture was an exercise of a right of free speech which has First Amendment protection. To the extent that Sec. 21 prohibits exhibiting, it is unconstitutional as applied to the defendant in this case."

[2] 247 N.E. 2d 574.

The exception in § 21 referring to § 21A was inserted by St. 1966, c. 265, § 3.[3] Section 21A was set forth in c. 265, § 1 which reads in relevant part:

> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained."

The Supreme Judicial Court considered the effect of Griswold v. Connecticut, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, and of St. 1966, c. 265, upon § 21 and concluded that "[t]he *Griswold* case and the ensuing statutory amendments swept away the ground of decision in Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938), which upheld convictions of individuals who were charged with selling or giving contraceptives to married women even if 'intended to be used for the prevention of conception only upon prescription by a duly qualified physician when necessary for the preservation of life or health according to sound and generally accepted medical practice' (p. 374, 15 N.E.2d p. 223). They did not, however, repeal the prohibition against laymen furnishing information or providing contraceptives, and they did not enlarge the

[3] Chapter 265 of St. 1966 is entitled "An Act authorizing registered physicians or pharmacists to furnish drugs or articles for the prevention of pregnancy or conception."

group who might be so informed or thus provided. Unmarried individuals are still excluded. There is nothing in § 21 purporting to prohibit giving advice, discussing, or lecturing on the subject of contraceptives." This construction by the highest Court of Massachusetts is binding upon this Court, so that factually petitioner's conduct is clearly proscribed by statute. No showing was made either in the State courts or before this Court that petitioner has ever been a physician or pharmacist or was otherwise professionally qualified to prescribe or dispense contraceptives.

To support his position, petitioner presents several constitutional arguments: that the statute lacks a legitimate legislative purpose; that it infringes his right of free speech; that it is unconstitutionally vague; that it is not severable; and that it violates a right of privacy.

Considering his arguments *seriatim*, the first question is whether there is a legitimate legislative purpose justifying the statute. On this issue the Supreme Judicial Court stated:

> "Since St.1879, c. 159, § 1, the public policy of this Commonwealth, as legislatively declared, has included a prohibition against distribution of articles for the prevention of conception. Not until the recent amendment by St.1966, c. 265, § 3, was any exception made in favor of doctors and others who by training or occupation might be deemed to have acquired a special qualification as distributors. The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences.
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> • • •
>
> "Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond

> legislative power. Unlike the legislation in Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 424–426, 204 N.E.2d 281, the prohibition in § 21, as applied to the defendant [petitioner] in this case, is directly related to a legitimate legislative purpose. The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient."

247 N.E.2d at 578. This Court accepts as valid and binding the construction placed upon § 21 by the State court.

Had § 21A authorized registered physicians to administer or prescribe contraceptives for unmarried as well as for married persons, the legal position of the petitioner would not have been in any way altered. Not being a physician he would still have been prohibited by § 21 from "giving away" the contraceptive.

A legislature has the constitutional power to limit the practice of medicine to qualified physicians. The statutes under attack deal with the distribution of contraceptive drugs and devices. It is a matter of common knowledge that contraceptive substances may have harmful effects on the health of those who use them and for that reason are still the subject of extensive medical research.[4] The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of members of the community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest.

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[4] In his Memorandum in support of the issuance of the writ the petitioner claims that the contraceptive substance he delivered to the young woman was "a safe and medically approved article." No such finding was made by the State courts; there is no basis in the record for such a finding by this Court.

Petitioner claims that the "giving away" of the contraceptive was constitutionally protected protest and speech. This Court, however, adopts the view taken by the Supreme Judicial Court that the bestowal of the contraceptive upon the young woman in the audience "added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment." This conclusion is in accord with recent pronouncements made by the Supreme Court of the United States in this area of constitutional law. Thus, in Cox v. Louisiana, 1965, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, the Court stated:

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. * * * We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., *supra*, 336 U.S. [490] at 502, 69 S.Ct. at 691, [93 L.Ed. 834], that 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.' "

And again in United States v. O'Brien, 1968, 391 U.S. 367, 376–377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672:

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First

Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.'

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [Footnotes omitted.]

Sections 21 and 21A meet all these requirements. First, from the discussion above it should be clear that a legitimate purpose of the statute was to safeguard the health

of citizens, unmistakably a traditional police power objective. Second, prohibiting the "giving away" of contraceptives is manifestly "unrelated to the suppression of free expression." Finally, the restriction on alleged First Amendment freedoms is, at best incidental. The petitioner was not convicted for any beliefs or views that he espoused or urged upon others, nor for exercising his right of free speech or of assembly, nor for any intellectual, moral, or other opposition he may have expressed against the Massachusetts statutes in question. He stands convicted solely for "giving away" a certain contraceptive medicine or article in violation of § 21.

Petitioner next attacks the validity of § 21 on the ground that it has been so "eroded" during the past half century as to be now "constitutionally vague." Petitioner, however, overlooks the fact that § 21 was reconsidered and acted upon by the Massachusetts Legislature as recently as 1966, when it inserted § 21A and amended § 21 (St.1966, c. 265, §§ 1 and 3) in order to bring § 21 into compliance with the decision of the Supreme Court of the United States in *Griswold, supra,* which had been handed down in 1965. The statutory provisions, as amended by the legislature and construed by the Supreme Judicial Court, are sufficiently clear to provide ascertainable standards of conduct and do not curtail or inhibit the exercise of individual freedoms protected by the Constitution. Cf. Baggett v. Bullitt, 1964, 377 U.S. 360, 84 S.Ct. 1316, 12 L. Ed.2d 377. The statutes are not constitutionally vague.

Petitioner further contends that "the prohibition of distributing found in § 21 is not severable from invalid portions of the section." The several acts prohibited by § 21 are stated in the disjunctive. Exhibiting is a distinct concept from selling, lending or giving away; and the prohibition against exhibiting can be eliminated when it conflicts with the First Amendment right of free speech without im-

pairing the significance of the prohibition against selling, lending or giving away. The Supreme Judicial Court effectively disposes of the petitioner's contention as follows:

> "The only word which is affected by this opinion is 'exhibits' as it applies to the defendant in giving the lecture. It may be constitutional in its application to others. This does not render it doubtful whether the Legislature would enact the balance of the statute, as in Pedlosky v. Massachusetts Inst. of Technology, 352 Mass. 127, 224 N.E.2d 414. In contemplation of the history of the statute, both remote and recent, we do not believe that the Legislature would prefer to have the entire statute fall if under the First Amendment the word 'exhibits' cannot stand, nor do we believe that in that circumstance they would prefer to treat as innocuous the other acts set forth in § 21:—selling or leading or giving away or offering to sell, lend or give away any of the prohibited articles."

247 N.E.2d at 579. This Court adopts this position.

Petitioner's remaining contentions is that the prohibition in § 21 against the giving away of contraceptives violates "the right of privacy." For this proposition he relies on *Griswold, supra*. In *Griswold* it was held that a Connecticut statute forbidding the *use* of contraceptives violated the right of marital privacy which is fundamental and basic and within the "penumbra" of specific guarantees of the Bill of Rights. "Marriage," observes the Court, "is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486, 85 S.Ct. at 1682. The Court further held that the appellants, who were physicians and prosecuted for giving medical advice to married persons as to the means of preventing conception, had standing to assert the constitutional rights of the married people

with whom they had a professional relationship. The use of contraceptives by married persons is not prohibited by any Massachusetts statute, and their distribution to such persons by registered physicians and pharmacists is authorized by § 21A. No violation of the right of marital privacy is involved in this case.

There is no statute in Massachusetts which makes it a crime for an unmarried person to *use* a contraceptive. Section 21, read with § 21A, however, prohibits everyone in Massachusetts, including registered physicians and pharmacists, from distributing contraceptives to unmarried persons. Another statute, Mass.G.L. c. 272, § 18, prohibits sexual intercourse between a man and an unmarried woman. The constitutionality of the latter statute is not challenged and was not litigated in the State court or in this Court.

Except as stated in the following quotation from page 3 of his Memorandum, petitioner does not specify what or whose right of privacy is being violated with reference to unmarried persons:

> "We are talking here not of the right to fornicate, not of the right to commit incest or adultery, nor of the right to be unchaste * * *; several laws exist for the prevention of these acts which are not in issue in this case. Instead, we are talking of the right of the individual to control his or her most private bodily functions."

The commission of fornication, incest or adultery necessarily involves the "most private bodily functions." All three acts are crimes under Massachusetts statutes, Mass. G.L. c. 272, §§ 14, 17 and 18. It has never been held, nor does petitioner suggest that it is beyond the constitutional powers of the State to punish such conduct as criminal.

Nor has it ever been held that a constitutional right of privacy shields acts of adultery, incest or fornication against intrusion by the State.

This Court, however, need not decide whether §§ 21 and 21A as construed by the Supreme Judicial Court violate some constitutional right of registered physicians in their professional relationship with unmarried patients, or of unmarried persons themselves. These questions are not presented by the facts in this case. The petitioner is not a physician and has no express or implied authority to act for physician. It does not appear that he himself is an unmarried person or has any professional or other legally significant relationship to unmarried persons. Therefore he lacks standing to assert the constitutional rights of either group.

Petitioner would have standing if a violation of his own right of privacy were involved; but in the circumstances of this case his prosecution for distributing a contraceptive substance to a person with whom he had no legally significant relationship is not an invasion of any right of privacy he can properly claim as his own.

This Court agrees with the holding of the Supreme Judicial Court that § 21 is constitutional as construed by that Court and as applied to the petitioner in the case for unlawfully giving away an article for the prevention of conception.

The Court finds and rules that the petitioner is not in custody in violation of the Constitution and laws of the United States. Therefore, in accordance with the provisions of 28 U.S.C. § 2254(a), the petition is dismissed.

Appendix C.

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# COMMONWEALTH
*v.*
# WILLIAM R. BAIRD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.
1969 Mass. Adv. Sh. 727, 247 N.E. 2d 574 (1969).

WILKINS, C.J. These are two indictments charging violations of G. L. c. 272, § 21, one (No. 29,688) for unlawfully giving away a certain medicine and article for the prevention of conception, the other (No. 29,689) for unlawfully exhibiting certain articles for the prevention of conception, both being not in accordance with G. L. c. 272, § 21A. The evidence shows that these acts occurred during, and incidental to, a lecture to students in an auditorium of an educational institution. The case, along with two motions to dismiss based on constitutional grounds, was heard by a judge of the Superior Court sitting without jury.

The defendant, pursuant to invitation, addressed a group of approximately 2,000 students in Hayden Auditorium at Boston University on April 6, 1967. The address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed with diagrams on two demonstration boards or contained in a cardboard box and with an exposition of their respective merits. During the address he stated that he was violating the

statute and invited arrest. At the close the defendant invited the members of the audience to come to the stage and to help themselves to the contraceptive articles. The defendant personally handed to a young lady a package of Emko vaginal foam, an admittedly contraceptive substance. At this point a police officer told the defendant to call his attorney to the stage and to "wind it up." The defendant was then taken to police headquarters in company with his attorney, who remained with him.

Following arguments, the judge made a finding of guilty, and denied the motions to dismiss. Being of the opinion that the defendant's motions raise questions of law which are both doubtful and important and require decision by the Supreme Judicial Court, he reported the case in accordance with G. L. c. 278, § 30, both parties assenting thereto. The report incorporates by reference the stenographic record and the exhibits, and contains all the material facts necessary for a review of the following question of law: Are the provisions of G. L. c. 272, § 21, constitutional?

The material part of G. L. c. 272, § 21, as amended through St. 1966, c. 265, § 3, is: "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion . . . shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

The exception in § 21 referring to § 21A was inserted by St. 1966, c. 265, § 3. Section 21A was set forth in c. 265, § 1, which reads in part: "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician. A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited

hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained."

The amendments made by St. 1966, c. 265, were brought about by the decision in *Griswold* v. *Connecticut*, 381 U. S. 479, which held unconstitutional as applied to married persons a statute prohibiting the use of contraceptives and the giving of advice on the subject.

The *Griswold* case and the ensuing statutory amendments swept away the ground of decision in *Commonwealth* v. *Gardner*, 300 Mass. 372 (1938), which upheld convictions of individuals who were charged with selling or giving contraceptives to married women even if "intended to be used for the prevention of conception only upon prescription by a duly qualified physician when necessary for the preservation of life or health according to sound and generally accepted medical practice" (p. 374). They did not, however, repeal the prohibition against laymen furnishing information or providing contraceptives, and they did not enlarge the group who might be so informed or thus provided. Unmarried individuals are still excluded.

There is nothing in § 21 purporting to prohibit giving advice, discussing, or lecturing on the subject of contraceptives. The two indictments, both limited to § 21, understandably do not call into question anything that the defendant said, but charge that he unlawfully gave away "a certain medicine and article," and unlawfully exhibited "certain articles for the prevention of conception." The defendant contends that his acts must be classified as speech, and are within the protection of the First Amendment. *Cox* v. *Louisiana*, 379 U. S. 559, 563. See *Commonwealth* v. *Dubin*, 327 Mass. 681. Compare *United States* v. *O'Brien*, 391 U. S. 367, 376. But merely because his acts are so classified does not assure constitutional protection.

An aspect of speech which does not receive constitutional protection is obscenity. *Roth* v. *United States*, 354 U. S. 476, 484–485. In some earlier decisions in this Commonwealth dealing with contraception it can be inferred that obscenity was a basis. See, for example, *Commonwealth* v.

*Allison*, 227 Mass. 57 (1917), a prosecution under a predecessor statute of G. L. c. 272, § 21, for the advertising, publication, and distribution of birth control pamphlets, which were described (p. 60) as "too indecent to be spread upon the records." In that case it was stated (p. 62), "The distribution of obscene printing was indictable at common law"; and (pp. 61–62): "One test of obscenity has been said to be whether its tendency is 'to deprave and corrupt those whose minds are open to such immoral influences.' *The Queen* v. *Hicklin*, L. R. 3 Q. B. 360, 371."

In *Roth* v. *United States*, 354 U. S. 476, 489, the opinion of the court stated, "The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." The *Roth* test was accepted as binding by this court. See *Commonwealth* v. *Moniz*, 338 Mass. 442, 443; *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 13–20; *Attorney Gen.* v. *"John Cleland's Memoirs of a Woman of Pleasure,"* 349 Mass. 69, 70–72, revd. sub nom. *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney Gen. of Mass.* 383 U. S. 413.

In *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney Gen. of Mass.* 383 U. S. 413, 418, the majority opinion contained the following: "We defined obscenity in *Roth* in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U. S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." The *Memoirs* case was treated as controlling in *Attorney Gen.* v. *"Naked Lunch,"* 351 Mass. 298, 299.

Tested by these standards, it cannot rightly be contended that the defendant's address was obscene in the constitutional sense. As was said in the *Roth* case, 354 U. S. at 484, "All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests." See *Commonwealth* v. *Moniz*, *supra*, 446; *Attorney Gen.* v. *"Tropic of Cancer"*, *supra*, 14".

There is another type of speech which does not have constitutional protection because it may "encroach upon the limited area of more important interests." This might apply if it is deemed "to create a clear and present danger" of substantive evil, to quote from Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52, or where "there . . . [is] reasonable ground to . . . [believe] that serious evil will result," to use the language of Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376. This is a subject fraught with difficulty for a State court, as the Justices have indicated in the past. See *Opinion of the Justices*, 349 Mass. 786, 791–793.

But where recent pronouncements of the Supreme Court of the United States seem to declare that the legislation may constitute an unwarranted interference with freedom of speech, it becomes our duty to ascertain, and apply, the meaning of those cases by which we are bound. This is the course we have endeavored to follow in the past. See *Commonwealth* v. *Pascone*, 308 Mass. 591, 594; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 339, 342; *Commonwealth* v. *Dubin*, 327 Mass. 681, 682–683.

In the *Griswold* case, 381 U. S. 479, the court's opinion stated (p. 482): ". . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . ." The reference to

freedom of speech in the *Griswold* case was a basis of the decision of the Supreme Court of New Jersey in *State* v. *Baird*, 50 N. J. 376, 380, which reversed the conviction of the one who is the defendant in the case at bar. He was there charged with having "exposed to the view of others contraceptives used to prevent birth." This had occurred in a van on a parking lot. The court noted that the New Jersey statute merely forbade display or exposure if "without just cause," and said that there was no conduct suggestive of obscenity or of obtrusiveness, pandering and the like; and that "the display or exposure was made in inoffensive circumstances and was incidental to the good faith explanation of birth control to a woman who had made specific inquiry on the subject" (p. 379). The court also emphasized that the enumeration of rights quoted from the *Griswold* case furnished protection for the defendant's conduct; saying (p. 380), "the display and exposure of the contraceptive devices were part and parcel of the dissemination and merely served to illustrate and clarify the information being properly given and received."

As has been noted, the defendant was not indicted for anything he said. We have to consider whether the exhibition of contraceptive devices, for which he was indicted, was incidental to, and part of, the lecture, and thereby within the protection of the First Amendment. The display of those articles was essential to a graphic representation of his subject.

We are of opinion that delivery of the lecture was an exercise of a right of free speech which has First Amendment protection. To the extent that § 21 prohibits exhibiting, it is unconstitutional as applied to the defendant in this case.

The indictment which charges giving away an article "for the prevention of conception" stands on a different footing.[1] There do not appear to be decisions binding upon us which

[1] In *Griswold* v. *Connecticut*, 381 U. S. 479, see dissenting opinion of Stewart, J. at p. 529, fn. 3: "If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials."

show that the charge would be held to be constitutionally invalid. Since St. 1879, c. 159, § 1, the public policy of this Commonwealth, as legislatively declared, has included a prohibition against distribution of articles for the prevention of conception. Not until the recent amendment by St. 1966, c. 265, § 3, was any exception made in favor of doctors and others who by training or occupation might be deemed to have acquired a special qualification as distributors. The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences. In these circumstances, absent any definite intimation, we shall not guess as to the probable attitude of the Supreme Court of the United States.

Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond legislative power. Unlike the legislation in *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 424–426, the prohibition in § 21, as applied to the defendant in this case, is directly related to a legitimate legislative purpose. The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.

The bestowal of this item upon an individual in the audience added nothing to the understanding of the lecture, and was not an exercise of a right guaranteed under the First Amendment. We do not accept the argument advanced in a brief of an amicus curiae that the gift of the foam was one of the "appropriate types of action" embraced within the guaranty of freedom of speech as stated in *Brown* v. *Louisiana*, 383 U. S. 131, 142. See *United States* v. *O'Brien*, 391 U. S. 367, 376. If, as there also contended, it is "implementing conduct . . . in the nature of advocacy," a phrase quoted to us from *National Labor Relations Bd.* v. *International Longshoremen's Assn.* 332 F. 2d 992, 999 (4th Cir.), we shall leave such declaration to be made elsewhere.

Even accepting the statute as constitutional in prohibiting distribution, there still must be considered whether there has been a violation in this respect. It is argued that the

act of giving away the device should have been, but was not, accompanied by an intention that the article be used for the prevention of conception. See *Commonwealth* v. *Corbett*, 307 Mass. 7 (1940), which construed G. L. c. 272, § 21, and states (12n.), "As has been shown, the words of the statute require proof of intended use for an illegal purpose, and are not satisfied by mere incidental result." The contention is developed that on the evidence the distributor's intent could have been any of a variety of reasons, including inviting arrest in order to test the validity of the statute. But the judge made no findings on this point, and we are not able to do so. There is also nothing to show that unlawful use was intended by the recipient. See the *Corbett* case, *supra*, 10.

In the case last cited, the article, according to the opinion of the majority, had ambiguous purposes. Had it been advertised as for the prevention of conception, the defendant could have been convicted. *Commonwealth* v. *Goldberg*, 316 Mass. 563. In the case at bar, the foam, as found by the judge, was admittedly a contraceptive, and the plea in behalf of contraceptives presented in the defendant's address has an effect analogous to the advertising in the *Goldberg* case. There was enough to warrant a finding of guilty on the indictment for giving away.

The defendant also invokes the Eighth Amendment arguing that the imposition of the maximum permitted penalty of five years for a violation of § 21 would be cruel and unusual punishment. He stresses that the penalty prescribed is as severe, or more so, as any to be found in statutes creating other offences which are serious crimes. We quote examples which carry a sentence of five years: Misprision of treason. G. L. c. 264, § 3. Indecent assault and battery on child under fourteen. G. L. c. 265, § 13B. Burning of insured property with intent to defraud. G. L. c. 266, § 10. Unnatural and lascivious acts with child under sixteen. G. L. c. 272, § 35A. The maximum sentence for adultery is three years and that for fornication is three months.

The maximum sentence is extremely severe, particularly when compared with the sentences provided in birth control legislation of twenty-three States cited in the defendant's

brief, and with sentences for other crimes in this Commonwealth.

Since the defendant has not been sentenced, we decline further to discuss the [illegible] at this time. See *Commonwealth* v. *Leis*, [illegible].

The defendant contends that the prohibition against giving away is not separable from the other provisions of § 21 relating to violations of the First Amendment. The only word which is affected by this opinion is "exhibits" as it applies to the defendant in giving the lecture. It may be constitutional in its application to others. This does not render it doubtful whether the Legislature would enact the balance of the statute, as in *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127. In contemplation of the history of the statute, both remote and recent, we do not believe that the Legislature would prefer to have the entire statute fall if under the First Amendment the word "exhibits" cannot stand, nor do we believe that in that circumstance they would prefer to treat as innocuous the other acts set forth in § 21:— selling or lending or giving away or offering to sell, lend or give away any of the prohibited articles.

The current dispute could have been more appropriately considered under proceedings for a declaratory decree. G. L. c. 231A. See *Mansfield Beauty Academy, Inc.* v. *Board of Registration of Hairdressers*, 326 Mass. 624. The choice of openly challenging the criminal law was unnecessary if the purpose was merely to test the statute and not for some other purpose, such as compelling public attention. See *State* v. *Baird*, 50 N. J. 376, 378–379.

From the fact that we rest this decision wholly upon the Federal Constitution and largely upon its construction by the Supreme Court of the United States, no inference should be drawn that the Declaration of Rights of the Constitution of the Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution. *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 343.

* Mass. Adv. Sh. (1969) 97, 106–107.

In answer to the question we state: G. L. c. 272, § 21, is unconstitutional as applied to the defendant in case No. 29,689, for unlawfully exhibiting certain articles for the prevention of conception, but § 21 is constitutional as applied to the defendant in case No. 29,688, for unlawfully giving away a certain medicine and article for the prevention of conception.

*So ordered.*

WHITTEMORE and CUTTER, JJ. (dissenting in part). 1. We concur in the first part of the majority opinion, viz. that Baird cannot be convicted constitutionally under § 21 for unlawfully exhibiting contraceptive articles. We also agree that raising these issues of constitutionality by declaratory proceedings would have been more appropriate than the course pursued by Baird.

2. We concur with what Mr. Justice Spiegel says in point First (set out in the fourth paragraph) of his dissenting opinion concerning the propriety of treating Baird's distribution of articles as constitutionally protected protest and speech.

3. We dissent from so much of the majority opinion as holds that Baird may be convicted under § 21 of distributing contraceptive articles, because we think (a) that § 21, read with § 21A, has been so much eroded in the last half century as to be now unconstitutionally vague, and (b) that the prohibition of distributing found in § 21 is not severable from invalid portions of the section.

*First* — Section 21 was designed (see *Commonwealth* v. *Allison*, 227 Mass. 57, 62, concerning a predecessor statute) to prohibit essentially all assistance of birth control. The section was described in *Commonwealth* v. *Gardner*, 300 Mass. 372, 374–375, as "plain, unequivocal and peremptory" and as containing "no exceptions." Its scope, however, has been cut down greatly since the *Allison* decision in 1917 in the following ways.

(1) In *Commonwealth* v. *Corbett*, 307 Mass. 7, 12, it was held that there could not be a conviction under § 21 for the sale of an article, susceptible of use to prevent disease as

well as for contraception, without proof that, in a particular case, the latter use was intended.

(2) Any use of the statute to prohibit serious discussion and assistance of birth control by speech, on the ground that it is inherently obscene, has become constitutionally impossible because of decisions of the Supreme Court of the United States referred to in the first part of the majority opinion.

(3) *Griswold* v. *Connecticut*, 381 U. S. 479, has greatly limited the possible application of § 21.

(4) The enactment of § 21A has permitted, subject to some limitations, the furnishing (by specified persons) of contraceptive articles and information to married persons.

(5) It remains uncertain to what extent § 21 may be constitutionally applied to prohibit advertising and manufacturing of contraceptives.

(6) The opinion in the present case concerning the invalidity of the prohibition of exhibiting contraceptives makes unenforceable a major provision of § 21. We think that the statutory prohibition of exhibiting necessarily applies to so many persons and so invades their freedom of speech as to make this prohibition unconstitutional on its face.

The consequence of these inroads or possible inroads on § 21 leaves it, when read with § 21A, of highly uncertain content and scope. We regard what remains of § 21 as comparable to the statutes held void for vagueness in *Alegata* v. *Commonwealth*, 353 Mass. 287, 293, 297–298, 300–301.[a] See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695, 708.

*Second* — It is also uncertain what legislative purpose now supports § 21, read with § 21A.

(1) Any valid purpose to suppress obscenity is gone, as the majority opinion shows.

(2) Any general purpose to prevent birth control no longer exists as a result of § 21A.

(3) To say that the legislative purpose is to restrain nonmarital intercourse would attribute to the Legislature an intention to use the risk of pregnancy as a deterrent to, or

[a] Mass. Adv. Sh. (1967) 1457, 1462, 1465–1467, 1469–1470.

punishment of, such intercourse. To do so would be contrary to the result and reasoning in *Commonwealth* v. *Corbett*, 307 Mass. 7, 8–12. See *State* v. *Baird*, 50 N. J. 376, 383. For reasons pointed out by Mr. Justice Spiegel in his dissent, with which we agree in large measure, the damage caused by an undesired pregnancy to the unmarried parents, to the unwanted child, and to society as a whole, is so disproportionate to any possible benefit as to raise grave constitutional doubts about the validity of such a deterrent if intended.

(4) We see in § 21 and § 21A, read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons. This circumstance suggests that the only purpose of § 21A was to meet what were believed to be the minimal requirements of the *Griswold* case, 381 U. S. 479.

All these considerations lead us to the conclusion that the crimes originally defined in § 21, and the legislative purposes originally there reflected, are largely gone. There seems to us to be no rational basis for using what little is left of a statute designed to prevent all assistance of all birth control merely to deter nonmarital intercourse. We also see no such basis for severing and separately applying the prohibition of distributing contraceptives, when what remains of the statute of which this prohibition forms a part has become so uncertain. See *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127.

SPIEGEL, J. (dissenting in part) I agree with the opinion with respect to the indictment charging the defendant with unlawfully exhibiting "certain articles for the prevention of conception."

I agree also that proceedings for declaratory relief would have been far preferable to this needless public demonstration. Such proceedings would have been an orderly method of raising the substantial constitutional issues and could have been so framed in behalf of persons having unquestioned standing as to present adequate facts for adjudication.

I do not concur with the majority's views on the indict-

ment for "unlawfully . . . [giving] away a certain medicine and article for the prevention of conception."

First, I am unable to discern the distinction the majority draw between the defendant's *exhibiting* and the defendant's *distributing*. As the opinion points out "these acts occurred during, and incidental to, a lecture to students." Each of these acts was "implementing conduct . . . in the nature of advocacy." *National Labor Relations Bd.* v. *International Longshoremen's Assn.* 332 F. 2d 992, 999 (4th Cir.). Basically the distribution should be considered part of constitutionally free speech and protest. See *Cox* v. *Louisiana*, 379 U. S. 536.

Second, I do not believe that §§ 21 and 21A reveal the "legitimate legislative purpose" claimed by the majority. The Legislature undoubtedly has the right to protect the health and safety of the public. However, I cannot infer or determine such an intent from a statute which limits the procurement of contraceptive devices to married persons. The adoption of § 21A permitting married persons to receive birth control devices with a prescription can only be interpreted as an attempt to save §§ 20 and 21 from the edict of the Supreme Court of the United States in the case of *Griswold* v. *Connecticut*, 381 U. S. 479. It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles "which may have undesirable, if not dangerous, physical consequences." If that was the Legislature's goal, § 21 is not required. See G. L. c. 94, § 187A; Federal Food, Drug & Cosmetic Act, 21 U. S. C. § 353 (1964).

Nor do I believe that the purposes set forth by this court over fifty years ago in the case of *Commonwealth* v. *Allison*, 227 Mass. 57, 62, are valid today.[1] Even if we disregard the mores of the era in which we live, intervening Federal decisions have overridden any intended desire to control

[1] "Manifestly . . . [the statutes] are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." *Commonwealth* v. *Allison*, *supra*, at 62.

contraceptive information as obscenity. The recent exception for married persons eliminates the propagation of a "virile and virtuous race" as a likely legislative purpose. In the case of *Commonwealth* v. *Corbett*, 307 Mass. 7, 8–9, this court rejected as a legislative purpose of § 21 the punishment of illicit sexual intercourse. Although in that case reference was made to the "spread[ing] unchecked" of venereal disease, we should also reject the thesis that "the Legislature intended pregnancy . . . to serve either as a restraint upon illicit affairs or as punishment for them." *State* v. *Baird*, 50 N. J. 376, 383. I am not convinced that the Legislature intended to risk the undesirable effects of an unwanted pregnancy. See U. Anderson and others, The Medical, Social, and Educational Implications of the Increase of Out-of-Wedlock Births, 56 Am. J. Pub. Health, p. 1866 (1966); U. S. Bureau of Public Assistance, Illegitimacy and Its Impact on the Aid to Dependent Children Program (1960); Fox, Abortion Deaths in California, 98 Am. J. Obstet. & Gyne. p. 645 (1967). The serious risk of an undesired pregnancy and the unwanted child, disastrous alike to the married as to the unmarried parents and to society as a whole, is utterly disproportionate in harm to any slight public benefit to be gained from a probably ineffective attempt to discourage fornication. It seems to me that § 21 arbitrarily and capriciously affects individual liberties and freedom of behavior and bears no "reasonable relation to some purpose within the competency of the State." See *Sperry & Hutchinson Co.* v. *Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418; *Mansfield Beauty Academy, Inc.* v. *Board of Registration of Hairdressers*, 326 Mass. 624, 627; *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 422–425; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–400; *Griswold* v. *Connecticut*, 381 U. S. 479, 485.

Third, even if I were not concerned with the two previous points discussed, I am convinced that the question of distribution cannot be severed from the other provision of § 21 which the majority agree is unconstitutional. See *Pedlosky* v. *Massachusetts Inst. of Technology*, 352 Mass. 127. I am

not satisfied that the "only word which is affected by . . . [the majority] opinion is 'exhibits' as it applies to the defendant in giving the lecture." As used in the section, the word is "vague and uncertain" (see *Herndon* v. *Lowry*, 301 U. S. 242, 259) and has a "chilling effect upon the exercise of First Amendment rights." See *Dombrowski* v. *Pfister*, 380 U. S. 479, 487, 490-492. In addition, I think that the opinion casts grave doubts on the constitutionality of the portions of § 21 which prohibit advertising and printing, to say nothing of its effect on § 20 as it relates to contraceptive devices. Furthermore, the distinction drawn by the Legislature between married and unmarried persons is of questionable validity. Such a distinction cannot be read out of the statute. Cf. *Commonwealth* v. *Gardner*, 300 Mass. 372, 377. Even without the distinction the original purposes of § 21 can no longer be carried out by the section as amended by the Legislature and interpreted by this court. Its scope of application is indefinite and vague (see *Alegata* v. *Commonwealth*, 353 Mass. 287[a]) and is a "hodgepodge" of uncertainties. See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695.

I am impelled to conclude that § 21 is incapable of being cut into segments which would be constitutionally valid without, in effect, performing judicial surgery.

*Joseph J. Balliro* for the defendant.

*Joseph R. Nolan*, Assistant District Attorney, for the Commonwealth.

*Roger P. Staley*, *Henry Herrmann* & *Robert S. Bowditch*, *Jr.*, for Planned Parenthood League of Massachusetts, amicus curiae, submitted a brief.

*Robert B. Kent*, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

*David S. Fitzpatrick* & *Alexander B. Grannis*, of New York, for The National Emergency Civil Liberties Committee, amicus curiae, submitted a brief.

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[a] Mass. Adv. Sh. (1967) 1457.

## Appendix D.

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### NOTICE OF APPEAL.
### UNITED STATES COURT OF APPEALS
### FOR THE FIRST CIRCUIT.

| | |
|---|---|
| WILLIAM R. BAIRD, Petitioner, Appellant; | Court of Appeals No. 7578. |
| *v.* | |
| THOMAS S. EISENSTADT, As he is Sheriff of Suffolk County, Massachusetts, Respondent, Appellee. | District Court No. 70-16-J. |

**Notice of Appeal to the Supreme Court of the United States.**

I. Notice is hereby given that Thomas S. Eisenstadt, as he is Sheriff of Suffolk County, Massachusetts, the Respondent, Appellee above-named, hereby appeals to the Supreme Court of the United States from the final order entered by the United States Court of Appeals for the First Circuit in the above-entitled action on July 6, 1970, granting a habeas corpus petition of the Appellant, William R. Baird, and reversing the order of the United States District Court for the District of Massachusetts, dismissing such petition.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

Signed,

JOSEPH P. NOLAN,
Attorney for THOMAS S. EISENSTADT,
New Court House,
Pemberton Square,
Boston, Massachusetts.

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Supreme Court, U.S.
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In the
# Supreme Court of the United States

OCTOBER TERM, 1970

70-17

No. ~~804~~

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
APPELLANT

*v.*

WILLIAM R. BAIRD,
APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## MOTION TO DISMISS OR AFFIRM

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,

APPELLANT

*v.*

WILLIAM R. BAIRD,

APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the Appellee moves the Court to dismiss the appeal herein on the ground set forth below, or to affirm the judgment sought to be reviewed on this appeal on the ground that it is manifestly based on decisions of this Court.

## Statement of the Case

This is an appeal under 28 U.S.C. §1254(2) by the State of Massachusetts from a decision of the United States Court of Appeals for the First Circuit in *Baird* v. *Eisenstadt*, as he is Sheriff of Suffolk County, Massachusetts, 492 F. 2d 1398 (1970), which held that the Massachusetts statute, Mass. G. L. c. 272 §21, is unconstitutional on its face as being arbitrary and grossly discriminatory and as having no legitimate legislative purpose. It was further held that the petitioner (appellee here), having been jailed for a direct violation of the statute, has standing to challenge the constitutionality of this statute.

THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL QUESTION OF LAW OR FACT FOR DETERMINATION BY THE COURT.

The decision of the United States Court of Appeals for the First Circuit is a clear application of the Constitutional principles laid down by this Court in the decisions of *Nebbia* v. *New York*, 291 U.S. 502 (1934), *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The United States Court of Appeals for the First Circuit held that the Massachusetts statute making it unlawful to deliver any drug or article for prevention of conception, except in case of a registered physician or pharmacist who could lawfully prescribe and furnish such drugs or articles to a married person (Mass. G. L. c. 272 §21), is void because it does not bear a real and substantial relationship to public health, safety, morals, or the general welfare; and it was further held that if the statute can be thought of as bearing a substantial relationship to a proper purpose, it is arbitrary and discrimina-

tory "because of the statute's total exclusion of the unmarried, and because of its palpable overbreadth with respect to the married." As for the claim that the challenged statute bears a substantial relationship to morality, Chief Justice Aldrich of the United States Court of Appeals for the First Circuit in the instant case wrote that such a view of morality ". . . conflicts with fundamental human rights." And the Justice relied on the various opinions in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) in support of this proposition.

## Conclusion

The decisions of this Court cited above are controlling as to all issues sought to be presented by this appeal. Accordingly, the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

WHEREFORE, Appellee moves the Court, for the reason stated, to affirm the judgment from which Appellant prosecutes his appeal and, in the alternative, to dismiss the same.

Respectfully submitted,

JOSEPH J. BALLIRO
*Counsel for Appellee*

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# Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1970.

No. 894

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
*Appellant,*

*v.*

WILLIAM R. BAIRD,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR THE APPELLANT.

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Chief—Appellate Division,
Suffolk County, District Attorney Office,
MAURICE H. SULLIVAN, JR.,
Legal Assistant to the District Attorney, Suffolk County.

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# Supreme Court of the United States.

October Term, 1970.

No. 804.

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,
*Appellant,*
*v.*
WILLIAM R. BAIRD,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR THE APPELLANT.

### The Opinions Below.

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at 429 F. 2d 1398 (1st Cir. 1970) (A. 47). The opinion of the District Court is reported at 310 F. Supp. 951 (1970) (A. 35). The opinion of the Massachusetts Supreme Judicial Court is reported at 355 Mass. 746, 247 N.E. 2d 574 (1969) (A. 17).

## Jurisdiction

The civil action in the United States District Court for the District of Massachusetts was commenced by the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. sec. 2241 (A. 7). After hearing, the court dismissed the petition (A. 4). Thereupon, the plaintiff (appellee herein) appealed to the United States Circuit Court of Appeals for the First Circuit (A. 12). After hearing, that court on July 6, 1970, vacated the order of the District Court and remanded the action thereto with instruction to grant the writ of habeas corpus (A. 47). Timely notice of appeal was filed with the Court of Appeals for the First Circuit on July 15, 1970 (A. 14).

Probable jurisdiction was noted by this court on March 1, 1971 (A. 6).

## Statutes Involved.

The Massachusetts statutes involved are Mass. G.L. c. 272, § 21, as amended by Acts of 1966, c. 265, §.3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprison-

ment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

And Mass. G.L. c. 272, § 21A, as inserted by Acts of 1966, c. 265, § 1, which provides:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

## Questions Presented.

1. Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional on its face as vague, arbitrary, discriminatory, overbroad, or lacking legitimate legislative purpose to the extent that it makes unlawful to give away to unmarried

persons medicines and other articles for the prevention of conception?

2. Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional as applied to the appellee, William R. Baird, who, not being a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse, was convicted for giving away certain contraceptive devices, to wit: vaginal foam, at a public lecture before an audience of approximately two thousand persons at Boston University?

## Statement of the Case.

In April, 1967, William R. Baird, the appellee herein, pursuant to an invitation, addressed a group of students at Boston University. Mr. Baird is not a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse. On a demonstration board he exhibited various contraceptive devices and at the close of his lecture he invited members of the audience, with none of whom he had any medical professional relationships, to come and help themselves. He personally handed an unmarried adult woman a package of vaginal foam. There was no evidence that he knew the woman beforehand. He was thereupon arrested and charged with exhibiting and delivering a contraceptive article (A. 6). The appellee was indicted and convicted of exhibiting and distributing contraceptive devices in violation of Mass. G.L. c. 272, § 21. On appeal, the Massachusetts Supreme Judicial Court unanimously held that the conviction for *exhibiting* contraceptive articles violated Mr. Baird's First Amendment rights. However, by a 4-3 majority, the court upheld the constitutionality of the provision against *delivering* as beyond the realm of free speech. *Commonwealth* v. *Baird*,

355 Mass. 746 (May 1, 1969) (A. 17). On January 12, 1970, the United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts*, 396 U.S. 1029 (1970). Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the District of Massachusetts (A. 71). Following a hearing, the petition was dismissed with opinion. *Baird* v. *Eisenstadt*, 310 F. Supp. 951 (1970) (A. 35). A claim of appeal having been filed, the United States Court of Appeals for the First Circuit issued a certificate of probable cause and ordered the appellee herein released on bail (A. 13). After a hearing, the Court of Appeals entered a judgment vacating the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus discharging Mr. Baird, *Baird* v. *Eisenstadt*, No. 7578 (1st Cir. July 6, 1970) (A. 47).

The appellant filed a notice of appeal to this court on July 21, 1970 (A. 14), and on March 1, 1971, this court noted probable jurisdiction (R. 6).

## Argument.

### I. Appellee has No Standing to Assert that the Massachusetts Statute is Unconstitutional on its Face: He Ought Not be Permitted to Question its Constitutionality in Contexts Other than that of the Precise Act for which He was Convicted.

The court below improperly concluded that appellee had standing to challenge the constitutionality on its face. Under settled views of judicial policy one ordinarily cannot assert the rights of another as a basis of a defense for an otherwise valid prosecution: *United States* v. *Raines*, 362 U.S. 17, 21; *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.* 226 U.S. 217; *LeClair* v. *O'Neil*, 307 F. Supp. 621, 624, appeal affirmed, 39, 3420 (3/30/71).

That rule has been somewhat relaxed where the accused has been charged under a broad and sweeping statute which has the effect of chilling preferred freedom safeguarded by the First Amendment. *E.g., Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507. But it had no such effect here, certainly not on the appellee, and not on others.

The statute is not by its terms directed towards freedoms of speech, press, petition or assembly, enumerated in the First Amendment. When such freedoms are involved an accused has standing to raise the issue of overbreadth unless he participated in that sort of "hard-core" conduct which the state obviously could constitutionally prohibit; conversely, if a statute by its terms is directed primarily toward conduct outside the penumbra of the First Amendment, then standing is accorded to the accused to raise the overbreadth issue only if his conduct is arguably protected by the First Amendment. Here appellee was, of course, not convicted for anything he said (cf. *Street* v. *New York*, 394 U.S. 576 (1969)) in his talk at Boston University. His right to communicate was not in any way interfered with.

In *Cantwell* v. *Connecticut*, 310 U.S. 296; *Thornhill* v. *Alabama*, 310 U.S. 88; *Terminiello* v. *Chicago*, 337 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415; *Edwards* v. *South Carolina*, 372 U.S. 229; *Baggett* v. *Bullitt*, 377 U.S. 360; *Cox* v. *Louisiana*, 379 U.S. 536; and *Dombrowski* v. *Pfister*, 380 U.S. 479—the statutes, either as written, or as authoritatively construed by the highest court of the particular jurisdiction, bore directly and indiscriminately on First Amendment activities. Moreover, in each of the above cited cases, with the possible exception of *Thornhill* and *Dombrowski*, a determination was made by this court that the conduct engaged in by the complaining party was that sort of conduct which normally enjoyed First Amendment protection.

The offense for which he was prosecuted and convicted was that he, not being a professional designated by the statute, gave away a contraceptive device.

We think it clear beyond any doubt that a legislature has the authority—indeed, the duty—to limit the practice of medicine to registered physicians. See *Watson* v. *Maryland*, 218 U.S. 173 (1910); *Reetz* v. *Minnesota*, 188 U.S. 505 (1903). This is particularly applicable where, as here, the legislation concerns, inter alia, the distribution of medicinal devices and formulae, the effects of which are still subject to considerable debate. In the present case, appellee never made a showing in the state courts or in the courts below that he was a licensed physician, or, indeed, that he was otherwise qualified to prescribe these devices. In these circumstances, petitioner is in no position to argue that the statute was unconstitutionally applied to him.

Consistent with his avowed purpose of mounting a broadside challenge to the statute, however, he has made a number of points that are, as to him, purely hypothetical. That the recipient of the foam was in this instance an unmarried person is irrelevant. He would as well have been guilty of the offense had he given it away to a married person. The statutory distinction between married and unmarried persons as recipients relates only to the situation where the designated professionals are the givers, and has no bearing upon the appellee who, not being such, is guilty of the crime regardless of the marital status of the recipient. Indeed, for aught that Mr. Baird knew, the person to whom he gave the Emko foam might well have been a married woman.

Even assuming that the statute in its present form violates some right of privacy because it deprives unmarried persons of access to contraceptive devices, that claim is not appellee's to make. He is not an unmarried person, and he has never asserted that he has been denied access to

contraceptive devices by operation of the statute. See *United States* v. *Raines*, 362 U.S. 17, 21 (1912); *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.* 226 U.S. 217 (1960); *LeClair* v. *O'Neil*, 307 F. Supp. 621, 624, appeal affirmed, 39, 3420 (3/30/71).

No interest of his as an unmarried person was invaded, nor was the privacy of his marriage intruded upon. In each of these aspects his arguments are hypothetical.

Nothing in *Griswold* is to the contrary. In that case, one appellant was the executive director of the Planned Parenthood League, and the other was a licensed physician. With respect to standing, the court noted that both enjoyed a professional relationship with persons who could raise the issue, and thus, that standing was established. Secondly, and more importantly, the statute under challenge prohibited the use of contraceptive devices by married persons and the appellants were charged as aiders and abettors with respect to the violation of that statute. The court thus noted that they—as aiders and abettors—were entitled to raise the same defenses that could be raised by the principal.

In any event, *Griswold* is not applicable to the present case. In that case, the court merely held that a state statute which forbade the use of contraceptive devices by married persons, and which, in its enforcement, necessitated governmental excursion into the privacies of the marital relationship, was in conflict with the United States Constitution. Neither defect is present here. The antidistribution statute does not punish the use of contraceptive devices by any person. Nor does it involve governmental exploration into the privacies of the marital relationship, since as pointed out above, Massachusetts General Laws, c. 272, § 21A, specifically provides that married persons may receive and use contraceptive devices from any registered physician, or from any registered pharmacist upon presentation of a

prescription from a registered physician. Moreover, as pointed out above, the statutory scheme also limits distribution to registered physicians and pharmacists, and nothing in *Griswold* indicates that a state cannot properly limit the distribution of drugs and medical aids to properly trained personnel.

This court has long adhered to the notion that it "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (concurring opinion), and cases cited. If there are potentially unconstitutional applications of the Massachusetts statute, which we do not envisage, it will be time enough to consider them if prosecutions are undertaken and only after the Massachusetts courts, as courts of first instance, have had opportunity to pass upon such application of the statute. The claim that the statute may be abused should not be entertained at the instance of one whose conduct is not even arguably protected by the First Amendment.

Prescribing medication obviously necessitates speech, but the First Amendment does not prevent a state from limiting practice to qualified professionals. If the appellee, or nonprofessionals in the future, are deterred by this conviction from practicing in this regard, certainly no protected speech has been impaired. The circuit court's ruling in effect permitted appellee to assert rights, the assertion of which this court has found to be warranted only in the context of certain First Amendment cases, where departure from the normal rule of testing the validity of statutes as applied is deemed justified by the need to curtail the "chilling effect" of such a statute on the rights of free expression of third parties. See, *e.g.*, *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-489; *Thornhill* v. *Alabama*, 310 U.S. 88, 96-98. No protected speech is involved.

## II. The Conduct for which Appellee was Convicted was within the Power of Massachusetts to Punish.

1. It is a function of the legislature, not the courts, to determine the need, desirability or utility of legislation absent a specific constitutional provision. Therefore, it is not the responsibility of the courts, through the Due Process Clause, to void laws thought to be "unwise or incompatible with some particular economic or social philosophy," *Ferguson* v. *Skrupa*, 372 U.S. 726, 729. Compare, formerly, *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915); *Adkins* v. *Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923); *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924), with the prevailing view that no longer is it permissible to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. See *West Coast Hotel* v. *Parrish*, 300 U.S. 379; *Olsen* v. *Nebraska*, 313 U.S. 236; *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483. As Mr. Justice Black noted in *Ferguson*, *supra*, at 730,

> "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

The constitutionality of Massachusetts General Laws c. 272, §§ 21, 21A, is not measured, then, by the belief "that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our notions of 'civilized standards of conduct.'" *Griswold* v. *Connecticut*, 381 U.S. 479, 513 (Mr. Justice Black dissent-

ing). For as this court has noted, it does not sit as a "super-legislature" to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions. See *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421.

In short, then, there is nothing in the generality of the Due Process Clause that empowers this court to nullify the deliberate choices of the elected representatives of the people of Massachusetts. See *Labin* v. *Vincent*, 39 L.W. 4344, 4346. If there has been an abuse of power by the legislative, "the people must resort to the polls, not to the courts," *Munn* v. *Illinois*, 94 U.S. 113, 134.

2. "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences," *Commonwealth* v. *Baird*, 355 Mass. 746, 753, except as authorized by statute. Such a policy is justified by the Commonwealth's right to protect the health of its citizens. Medical authorities indicate that professional advice is needed at the outset, in order to determine the best method of contraception to be employed, and to insure its suitability.

> "There is no one 'best method' to prevent conception. The effectiveness of any contraceptive measure depends not only on its degree of protection against pregnancy but also on how well the measure suits the couple utilizing it. Contraception involves social as well as biological factors. The advice of an interested doctor should be sought to help the couple select the contraceptive method that will be most effective for them." Robert J. Damarest and John J. Sciarra, Conception, Birth and Contraception, a Visual Presentation (p. 90).

"A careful history, a complete physical examination, including a pelvic exam and cytologic smears should be done before any method of contraception is prescribed. Each patient must be carefully individualized . . . A close, adequate follow-up every four to six months is equally important." Elizabeth S. Waugh, M.D., Preventive Measures and Problems of Negative Selection, "Journal of the American Medical Women's Association," vol. 23, No. 9, September, 1968, p. 807.

Medical expertise is likewise necessitated by the fact of possible medical side-effects of contraceptive devices, regardless of the method of contraception chosen.

Spermicidal vaginal preparations contain a chemical that will kill sperm or make them incapable of penetrating cervical mucus. These preparations are available in various forms including foams. Conception, Birth and Contraception, a Visual Presentation, *supra*, at 96. Certain women may be allergic to some of these products. Itching, irritation, wetness, or discharge may result from their use. Planned parenthood, "Choosing a Contraceptive, Vaginal Spermicides (foam, cream, jelly, suppository)." Despite the fact that Emko, the vaginal foam which the appellee was convicted of distributing, may be purchased without a prescription, such results may occur as a consequence of its use.

"Medical cautions . . .

"Irritation may occur. If it does discontinue use and consult your physician . . ." (Emko Instructions).

Although Baird was convicted of distributing Emko, the distribution of all contraceptives including the diaphragm, condom, intrauterine devices, and oral contraceptives is prohibited by the statute, except as authorized. Implicit in his distribution of Emko was a tacit recommendation that it

is to be preferred by the recipient to some other method of contraception. This recommendation calls for a professional judgment. The diaphragm, which requires fitting by a physician, generally causes no side effects, but if improperly fitted, is useless and painful. It is recommended that a woman return to the doctor once a year to be sure the diaphragm remains properly fitted, and to have a pap smear. Planned parenthood, "CHOOSING A CONTRACEPTIVE, The Diaphragm and Cream or Jelly."

The condom may sometimes cause irritation to the inner walls of the vagina. Planned parenthood, "CHOOSING A CONTRACEPTIVE, The Condom (safe, rubber, sheath)."

Intrauterine devices must be inserted by a physician. Discomfort or bleeding may result from their use, Conception, Birth, and Contraception, a Visual Presentation, *supra*, at 109, as well as cramps, backache, heavier menstrual flow, spotting and bleeding. Planned parenthood, "CHOOSING A CONTRACEPTIVE—the Intrauterine Device (IUD, Coil, Loop)."

This uncertainty, as to the side-effects of "the pill" so called, is perhaps best exemplified by the testimony of numerous medical authorities in hearings before the Senate Subcommittee on Monopoly of Small Business, early in 1970. There new evidence was outlined in detail to support links between oral contraceptive use and breast cancer, blood clots, diabetes, arteriosclerosis (Boston Globe, January 18, 1970, p. 1, col. 2), danger to the fetus in the form of extrachromosomes (Newsweek, January 26, 1970, p. 21, col. 3), adverse effects on fertility (New York Times, January 15, 1970, p. 1, col. 4) and potential long range mutagenic (mutation causing) effects (New York Times, January 15, 1970, p. 1, col. 4).

With the possibility of such effects being caused by the contraceptive devices mentioned, it, then, cannot be doubted that "The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of the

community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest." *Baird* v. *Eisenstadt,* 310 F. Supp. 951, 954. Under the circumstances, the state would be remiss in its obligations if it did not prevent distribution of contraceptive devices indiscriminately by nonprofessional persons.

3. While at one time the Massachusetts "birth control" law was absolute in its prohibitions, *Commonwealth* v. *Gardner,* 300 Mass. 372 (1938), *Griswold* v. *Connecticut,* 381 U.S. at 485, significantly restricted a state's right to use all means of birth control regulation reasonably related to effectuating the legislative purpose of protecting the public health and welfare. *Griswold* concerned itself with the zone of privacy created by the marital relationship. It recognized that once a state acknowledged a marriage and the intimacies inherent in it, it may not undertake to regulate by means of the criminal law the details of that intimacy (381 U.S. at 499). Likewise, the court recognized that the Connecticut law which forbade the *use* of contraceptives by *married persons* had the effect of injecting the state into the "sacred precincts of marital bedrooms" thereby having a maximum destructive impact upon the relationship, at 485.

The court, therefore, found that the Connecticut statute violated the familiar constitutional principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama,* 377 U.S. 288, 307. Yet, while *Griswold* recognized the sanctity of the marital relationship, the intimacies in-

herent in it and the consequent limitation of a state's power to regulate the relationship, it clearly distinguished such a situation from the one here involved, that is, the distribution of contraceptives to unmarried persons, by one other than a physician. The court acknowledged as "beyond doubt" the right of the state "to enact statutes regulating the private sexual lives of single persons" (381 U.S. at 498.

Since 1879, when the Massachusetts legislature enacted this statute it has been a crime to distribute contraceptives. This statute was enacted under the police powers of the state and represents a law within this power to protect both morals and health. It is fatuous to argue that a law limiting distribution of contraceptives to the married does not bear a reasonable relationship to morals. The success or lack of success which such law has on the protection of morals should not be the measure of its constitutionality.

What radical change has occurred in the society in which we live to make such a law now unconstitutional? Have people acquired rights to extra-marital relations free of any public and criminal responsibility? If so, what becomes of our laws against fornication and adultery?

The Massachusetts Supreme Judicial Court said in *Commonwealth* v. *Allison*, 227 Mass. 57 (1917), at p. 62:

> "The statutes under which the several counts in this indictment are drawn contravene no provision of the constitution. Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the State."

Nothing relevant to this issue has occurred since 1917 to change the legislative purposes as delineated in *Commonwealth* v. *Allison, supra*. This statute is still designed "to promote the public morals." Its purpose in protecting purity and chastity is still viable in 1970 and even perhaps much more necessary than in 1917.

The court below has adopted the specious argument of Baird that there is some "right" of the unmarried to have sexual intercourse free of unwanted pregnancy. Such a right does not exist except by an attempted judicial fiat. *Poe* v. *Ullman*, 367 U.S. 497, 553.

If such right exists, then our laws punishing fornication and adultery are necessarily unconstitutional.

The presumption of validity in favor of the statute places the burden on Baird to demonstrate its unconstitutionality. While Baird frequently refers to the rising rate of illegitimacy, he is conspicuously silent on statistics which might prove that the free and lawful distribution of contraceptives has reduced the rate of illegitimacy in those states which permit such distribution. The burden is his, not ours. In a word, Baird has failed to show that the statute does not bear a reasonable relationship to a proper object of legislative concern.

The court below attempted to ridicule the "health argument" by asserting the "right" of the unmarried to the same professional assistance of physicians as afforded the married, and by characterizing the denial of professional help to the unmarried, "grossly discriminating." This argument is fallacious because it is predicated on the totally untenable ground that the unmarried have a "right" to indulge in the act of sexual intercourse which creates the need for professional contraceptive advice. This right just does not exist.

One might think after reading the opinion of the court below that an unmarried person required this type of pro-

fessional advice and service as a result of accidentally contracting typhoid fever or diptheria. It becomes important to remind ourselves that an unmarried person needs this type of professional advice only if he violates or contemplates the violation of the law.

Massachusetts General Laws, c. 272, §§ 21, 21A, by their very terms, deal only with regulating the dissemination of contraceptives to the unmarried. While prior to 1966, and the statute unequivocally outlawed the distribution of birth control information to any class of individuals, married or unmarried, the legislature eliminated any overbreadth by enacting sec. 21A, in response to *Griswold*.

The statute now, therefore, does not sweep into any rights of privacy guaranteed to married persons. It merely regulates the sexual conduct of single persons, who do not share in the same rights of the married, as enunciated in *Griswold*. The Massachusetts Supreme Judicial Court also made the distinction:

> "The *Griswold* case and the ensuing statutory amendments . . . did not enlarge the group who might be so informed or thus provided. Unmarried individuals are still excluded." *Commonwealth* v. *Baird*, 355 Mass. 746, 749 (1969).

## Conclusion.

For the above reasons, appellant submits that Massachusetts General Laws, c. 272, §§ 21, 21A, be upheld in their particular application to the appellee, that the decision of the Court of Appeals be reversed and that of the United States District Court be reinstated.

Respectfully submitted,

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# Supreme Court of the United States.

OCTOBER TERM, 1970.

No. ~~204~~ 70-17

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
*Appellant,*
*v.*
WILLIAM R. BAIRD,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR THE AMICUS CURIAE, PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS.

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# Supreme Court of the United States.

October Term, 1970.

No. 804.

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,
*Appellant,*
*v.*
WILLIAM R. BAIRD,
*Appellee.*

## BRIEF FOR THE AMICUS CURIAE, PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS.

### Correction of Statement of Case by Respondent Sheriff Eisenstadt.

The Eisenstadt brief's Statement of the Case misstates an important fact in the case. The Statement of the Case (Brief, p. 4) reads in part:

> "He personally handed an unmarried adult woman a package of vaginal foam."

There was no evidence at the trial, and none appears in the record as to whether the woman was married or unmarried.* This is clear from the opinion of the Massachu-

* Nor is there any evidence off the official record as to her name or marital status.

setts Supreme Court in *Commonwealth* v. *Baird*, 355 Mass. 746. The Massachusetts court referred to the recipient as a "young lady."

It will be shown below that this fact is significant because of the decision in *Sturgis v. Attorney General*, Mass. Adv. Sh. (1970) 1139, 260 N.E. 2d 687. That case, considering the meaning and constitutionality of the birth control law (section 21), is neither cited nor discussed in the brief of the Respondent Sheriff Eisenstadt.

## Argument.

### I. The Inconsistent Decisions in Commonwealth v. Baird, 355 Mass. 746 and Sturgis v. Attorney General, Mass. Adv. Sh. (1970) 1139, Show that Massachusetts G.L. c. 272 § 21, Violates the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment requires a regulatory statute to bear a reasonable relationship to a proper legislative purpose. *Nebbia* v. *New York*, 291 U.S. 502, 537; *Meyer* v. *Nebraska*, 262 U.S. 390. Two criteria must be met: (1) Is there a proper legislative purpose underlying the statute; and (2), if such a purpose is found, does the statute bear a reasonable relationship to that purpose.

The Court of Appeals in a carefully reasoned opinion held that these criteria were not met by G.L. c. 272, § 21. An examination of the two relevant Massachusetts decisions evidences the correctness of that decision.*

---

* The argument (page 11 of the Eisenstadt brief) that "there is nothing in the generality of the Due Process Clause that empowers this court to nullify" the statute is readily disposed of. The argument relies on *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, in which the court stated the principle that it would not substitute its wisdom for the states with respect to "their internal commer-

The first Massachusetts decision upheld the birth control law (4-3) on the grounds that it was a public health statute, saying that it put the distribution of contraceptives in the hands of doctors. *Commonwealth* v. *Baird*, 355 Mass. 746, 753:

> "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences. In these circumstances, absent any definite intimation, we shall not guess as to the probable attitude of the Supreme Court of the United States.
>
> "Therefore, we do not declare that a statute preventing distribution by indiscriminate persons is beyond legislative power. . . . *The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.*" (Emphasis supplied.)

Chief Justice Wilkins accurately pointed out for the majority that this rationale made the legislative distinction between married and unmarried recipients irrelevant. This point was also made by the minority, for Justices Whittemore and Cutter pointed out in their dissent at page 758:

> "If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons."

Thus, both the majority and minority in the 4-3 decision recognized that there is no reason why such drugs and arti-

---

cial and business affairs." That case upheld a Kansas statute regulating the business of debt adjusting. This Court's power to measure birth control legislation against the Constitution was established in *Griswold* v. *Connecticut*, 381 U.S. 479.

cles pose any greater dangers to unmarried women than to married women.

If *Commonwealth* v. *Baird* were (as the Respondent Sheriff Eisenstadt would apparently have the Court believe) the only decision on the Massachusetts birth control law, section 21 might stand up. That decision was carefully reasoned. However, that decision is *not* the last word. The claimed public health purpose must be considered in the light of the subsequent decision in *Sturgis* v. *Attorney General*, Mass. Adv. Sh. (1970) 1139.*

In *Sturgis* it is fair to say that the Court abandoned the careful reasoning of *Commonwealth* v. *Baird*. The *Sturgis* case raised the issue of whether a gynecologist could legally prescribe a birth control device for an unmarried person when "medical opinion" was that "sound medical practice" called for such action. The Court held that a gynecologist could not prescribe for an unmarried person, saying at 1142:

> "In short, the Legislature is free to conclude that some harm may conceivably attend the employment of contraceptive devices. If such be so, the prohibition against their distribution bears a real and substantial relation to the legislative purpose. We are aware that it may well be that certain contraceptive medication and devices constitute no hazard to health, *in which event it could be argued that the statute swept too broadly in its prohibition.*" (Emphasis supplied.)

With this language, the decision brushed away (a) the fact that the statute applied one rule (of health?) to a person with a marriage certificate and another rule (of health?) to an unmarried person; (b) the fact that the statute applied

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* It is significant that the U. S. District Court opinion was issued March 20, 1970 *without* the benefit of the decision in *Sturgis* v. *Attorney General*, handed down June 29, 1970. The Court of Appeals decision was subsequent to the *Sturgis* case.

to *all* birth control methods, even those prescription and non-prescription items as to which no health question had ever been raised.

Thus, the Court denied unmarried women the right to "sound medical practice," and denied to qualified gynecologists the right to exercise their best medical judgment. Cf. *Meyer* v. *Nebraska*, 262 U.S. 390. Gynecologists could prescribe contraceptives for a woman whose husband was overseas, but not for a young lady getting married the next week. They could prescribe contraceptives for a woman legally separated from her husband, but not for a welfare mother in the ghetto. The decision contented itself with pointing out:

> "There can be no doubt that the enforcement of the statute does create certain factual situations which at best can be described as unhappy." Mass. Adv. Sh. (1970) at 1142.

Thus the Massachusetts Court virtually abandoned the public health argument, which Eisenstadt (pages 11-14) seeks to resurrect by a series of quotations and statements regarding the alleged perils of certain birth control devices. If further argument were needed, the Court of Appeals supplied it (429 F. 2d at page 1401):

> ". . . the legislature has recognized that health does not require prohibition; a physician may safely prescribe for married persons. If the prohibition which the court supports is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality. For reasons we will come to, we do not believe that health is the legislative purpose, but if it is, the statute is arbitrary, and by the same token, grossly discriminatory.

"In addition, we must take notice that not all contraceptive devices risk 'undesirable . . . [and] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless.

"In this posture it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married. If there could be any doubts, it is to be noted that health protection, even for the married, had no place prior to the 1966 amendment. The legislature intended just the opposite. Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Commonwealth v. Gardner, 1938, 300 Mass. 372 . . . The court in Baird gave the reason for the change. 'The amendments made by St. 1966, c. 265 [Section 21A, n. 1, ante] were brought about by the decision in Griswold v. Connecticut, 381 U.S. 479 . . . which held unconstitutional as applied to married persons a statute prohibiting the use

> of contraceptives and the giving of advice on the subject.' 1969 Mass. A.S. at 729 . . . On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling."

Indeed, the latter statement seems also to have been the conclusion of the Massachusetts Court in the *Sturgis* decision, as is set forth below.

Finally, it is worthy of note that the alleged public health purpose is contrary to official United States policy. The United States supplies family planning funds to state health agencies under Section 508 of Title V of the Social Security Act, 42 U.S.C. Section 708 (1967 Amendments), administered by the Secretary of the Department of Health, Education and Welfare. Section 208.7(e) of the Regulations promulgated under the statute, 34 F.R. 1241, requires that in order to obtain HEW financing, services in the program *must be available without regard to marital status.* (See Appendix.)

On May 21, 1971, the Department of Health, Education and Welfare announced a funding for family planning for low-income Massachusetts residents in four areas—Springfield, Lowell, Brockton and the North Shore. This program will enable nine major hospitals to provide family planning service to low-income persons in more than thirty cities and towns. *This program was made possible by the decision of the Court of Appeals.* Its fate is now in the hands of this Court because of the regulations set forth in the Appendix.

Thus, the United States has a positive policy that unmarried persons should not be discriminated against. Massachusetts purports to *require* a physician to discriminate among his patients.

The reason given in *Sturgis* v. *Attorney General* for upholding the statute is no more than the statement that this Court's decision in *Griswold* v. *Connecticut* dealt only with married persons and that the statute was modified to that extent only.* The Massachusetts Court said at 1142-1143:

> "The Supreme Court of the United States found the Connecticut statute too broad in scope and thus restricted the Legislature from interdicting distribution of birth control devices to married persons. However, the *Griswold* case, as the Attorney General argues, affirmed 'beyond doubt' the right of the State of Connecticut to enact statutes regulating the private sexual lives of single persons, *stating that the discouraging of extra-marital relations is 'admittedly a legitimate subject of state concern' and that the statutes within the basic purpose 'of protecting marital fidelity* are available to Connecticut without the need to "invade the area of protected freedoms."' *Griswold* v. *Connecticut, supra,* at 498, Goldberg, J., concurring."

Thus, the Massachusetts Court abandoned the public health argument and seized on the arguments that (a) the only constitutional protection was to married persons; and (b) the law was valid because of a purpose of "the discouraging of extra-marital relations" and "of protecting marital fidelity."

In fact, the Massachusetts statute has no rational relationship to extra-marital relations, and does nothing about "protecting marital fidelity." The statute permits *any* married person to obtain contraceptives; it prohibits any unmarried person from obtaining any contraceptives, even one as to which no question has been raised.

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* As stated above, to this extent the Massachusetts Court and the Court of Appeals agree.

This law, upheld to discourage extra-marital relations, permits any *married* person to get contraceptives:

(1) even if living apart from a spouse

(2) even if the spouse is overseas

(3) even if a decree nisi of divorce has been issued but is not absolute.

By contrast, it forbids contraceptives to a "young lady" who is getting married the following week, and to the poor person forced to rely on public health facilities.

Is the law intended to discourage fornication? As the Court of Appeals pointed out, fornication is a misdemeanor, punishable by a thirty dollar fine or three months in jail. G.L. c. 272, § 18. Violation of § 21 is a felony, punishable by five years in prison. The Court said at 1401:

> "We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor."

The Court reasonably, logically, and indeed inevitably concluded the statute

> "conflicts with fundamental human rights . . . it is beyond the competency of the state." (At 1402.)

Finally, it should be noted that, whatever strength there is to the morality argument, it is inapplicable to Baird. *There was no evidence that the "young lady" who received the Emko foam from Baird was unmarried.* Neither her identity nor her marital status appears anywhere in any record. If the statute's purpose was to prevent extra-marital sex, there was a burden on the Commonwealth to show that the recipient was unmarried. There was no such evidence.

In *Commonwealth* v. *Baird*, at p. 753, Justice Wilkins and the majority recognized that the decision's logic made the distinction between married and unmarried irrelevant:

> "The legitimacy of the purpose depends upon a distinction as to the distributor and not as to the marital status of the recipient.

Baird was tried and convicted on this basis. If this logic had been followed through in *Sturgis*, and the distinction as to the marital status of the recipient held irrelevant, section 21 could be reasonably supported as a public health law. Instead, *Sturgis* completely ignored this language in *Baird*, and did not deal with the problem. *Sturgis* (1) abandoned the public health argument except to say it was legal to bar all contraceptives because a *question* had been raised as to some, and (2) fell back on an argument of "protecting marital fidelity" and "the discouraging of extra-marital relations."

If section 21 is reviewed as a morality statute, it is ineffective and illogical. Moreover, if it is a morality statute, there was a fatal gap in the proof against Baird. This in itself, however, suggests that section 21 is neither public health statute nor morality statute, but rather is an unconstitutional relic which should be declared void.

## II. The Petitioner Baird has Standing to Attack the Constitutionality of the Statute under which he was Imprisoned.

The Respondent Eisenstadt argues (pages 5-9) that Baird cannot attack the constitutionality of section 21. The argument is erroneous as a matter of law.

At the outset, it should be noted that Baird attacked the constitutionality of section 21 at all times before the Massachusetts Courts. His right to do so, on the grounds argued here, was never questioned. As the Court of Appeals pointed out:

". . . the Massachusetts court implicitly recognized petitioner's standing and interest. 1969 Mass. A.S. at 735." 429 F. 2d at 1402.

Baird also raised the issue of constitutionality before the District Court, and before the Court of Appeals. Eisenstadt's challenge to Baird's standing is almost an afterthought, because (a) it does not appear in the jurisdictional statement, (b) it was never raised in any brief below, but only in the oral argument before the Court of Appeals.

It is fair to say that Eisenstadt has sought to raise the question of standing seriously only before this Court. We respectfully suggest that the issue is not timely.

Furthermore, the issue is not sound as a matter of law.

First, the Respondent Eisenstadt's brief ignores the fact that "standing" is not a simple concept, and the applicable principles depend in large part on how a case arises.

The principal category of cases on "standing" are clearly inapplicable here. These are the cases in which a *plaintiff* attacks a statute or regulations—cases dealing with the complex subject of the right to *bring* an action—*i.e.*, "standing to sue." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150. *Barlow* v. *Collins*, 397 U.S. 159. *Flast* v. *Cohen*, 392 U.S. 83. As the Court said in *Flast* at page 101:

". . . the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

In these cases there is usually present the issue of whether the plaintiff has a justiciable controversy under Article III of the United States Constitution. These cases are clearly not applicable.

*United States* v. *Raines*, 362 U.S. 17, cited by Eisenstadt, is similar in principle. The Court refused to rule on the constitutionality of the Civil Rights Act of 1957, saying at page 21:

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' "

Related cases, also inapplicable, are ones in which the petitioner attacks the constitutionality of a statute before exhausting his state court remedies. *Younger* v. *Harris*, U.S. , and companion cases decided February 23, 1971. *LeClair* v. *O'Neil*, 307 F. Supp. 621 (1969), cited at pages 5 and 8 of the Eisenstadt brief, is distinguishable for this reason as well as for others. The federal court action was brought while state court action was pending.

In sharp contrast are the cases in which the constitutional attack is made by a *defendant*. *Barrows* v. *Jackson*, 346 U.S. 249, 255, 256:

> "Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348 (concurring opinion). [80 L. ed. 688, 710, 711, 56 S. Ct. 466.] The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This prin-

> ciple has no application to the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

In that case, a civil defendant successfully pleaded the constitutional rights of others because he stood to suffer a pocketbook injury. *A fortiori*, a defendant in a criminal case should be permitted to attack the constitutionality of a statute.

Under the reasoning of *Barrows* v. *Jackson*, Baird clearly has standing to question the constitutionality of section 21. He is not raising a theoretical issue; he has been injured; he was actually in jail when released by the Court of Appeals.

The principle is well established that a defendant can successfully attack a statute which (as here) is unconstitutional on its face. Such an attack occurs most frequently when the statute conflicts with the First Amendment, as in *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507. The Respondent Eisenstadt suggests that this is the only time a defendant can argue that a statute is unconstitutional on its face. The law is otherwise. The First Amendment cases are merely the most frequent.

For example, a statute can be attacked *on its face* because it is unconstitutionally vague. *Lanzetta* v. *New Jersey*, 306 U.S. 451. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81. In these cases the Court did not consider the statute's possible applicability to the particular criminal defendant, but concerned itself only with the definiteness (or lack of it) of the statute on its face.

Similarly, as here, a defendant can attack a statute which purports to define a crime, but which violates the Due Process Clause because either (1) the statute has no proper legislative purpose, or (2) the statute is not rationally designed

to accomplish that purpose. *Meyer* v. *Nebraska*, 262 U.S. 390. In that case the Court reversed a conviction for teaching German to children below the eighth grade. The Court said at page 401:

> "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."

The statute was held at page 403 "arbitrary and without reasonable relation to any end within the competency of the State." Although the Court referred to the right of the defendant to carry on his profession as a teacher, it was obviously more concerned with the right of the pupils to receive instruction in German.

Hence it is well established that a defendant in a criminal case can attack the constitutionality of a statute, even though to some degree he may rely on the constitutional rights of others.

Furthermore, Baird is not in fact relying on the constitutional rights of others. As the Court of Appeals pointed out, he is arguing that the statute is void. He is not saying "I should be freed from jail because a girl getting married next week has a right to obtain medical assistance on birth control." Rather, Baird is saying "I was convicted under a statute which violates the Due Process Clause because it does not meet the test that (i) it have a rational purpose, and (ii) it be reasonably designed to carry out that rational purpose." Cf. *Meyer* v. *Nebraska*, 262 U.S. 390.

Baird's case is particularly strong because his conviction was upheld on the ground that section 21 was a public health law designed to put distribution in the hands of doctors. *After* Baird was convicted, and *after* he was in jail, the Court changed its mind and decided it was not a public health law but a law to preserve marital fidelity. It would be a mockery of justice for this Court to hold that a prisoner

could not attack the constitutionality of the statute under which he was convicted, when the rationale of the decision upholding his conviction has subsequently been repudiated by the same Court.

## Conclusion.

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for amicus curiae.

## Appendix.

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SOCIAL SECURITY ACT OF 1935, TITLE V, SECTION 508, 42 U.S.C SECTION 708.

(a) In order to help reduce the incidence of mental retardation and other handicapping conditions caused by complications associated with childbearing and to help reduce infant and maternal mortality, the Secretary is authorized to make, from the sums available under clause (B) of paragraph (1) of section 702 of this title, grants to the State health agency of any State and, with the consent of such agency, to the health agency of any political subdivision of the State, and to any other public or nonprofit private agency, institution, or organization, to pay not to exceed 75 percent of the cost (exclusive of general agency overhead) of any project for the provision of—

. . . . . .

(3) family planing services,

but only if the State or local agency determines that the recipient will not otherwise receive such necessary health care or services because he is from a low-income family or for other reasons beyond his control. Acceptance of family planning services provided under a project under this section (and section 712 of this title) shall be voluntary on the part of the individual to whom such services are offered and shall not be a prerequisite to the eligibility for or the receipt of any service under such project.

SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE SRS PROGRAM REGULATION 50-1, SECTION 208.7 (e), 34 F.R. 1241, 1242 (January 25, 1969).

Services in the project must be available:

(e) Without regard to race, religion, national origin, or maternity or marital status.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

October Term, 1970

70-17

No. 304

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,

*Appellant,*

*v.*

WILLIAM R. BAIRD,

*Appellee.*

On Appeal from the United States Court of Appeals for the First Circuit

## BRIEF OF THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AS *AMICUS CURIAE*

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IN THE

# Supreme Court of the United States

October Term, 1970

No. 804

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,

*Appellant,*

*v.*

WILLIAM R. BAIRD,

*Appellee.*

On Appeal from the United States Court of Appeals for the First Circuit

## BRIEF OF THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AS *AMICUS CURIAE*

### Statement of Interest of *Amicus Curiae*

This brief is submitted on behalf of Planned Parenthood Federation of America, Inc., also known as Planned Parenthood World Population, with the consent, filed with this Court, of both parties.

Planned Parenthood Federation of America, Inc. (hereinafter called "Planned Parenthood") is a membership corporation originally organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. As of May, 1971, Planned Parenthood had 190 affiliates in 42 states and the District of Columbia operating approximately 700 family planning clinics offering services to the public. It is the leading national voluntary public health organization in the field of family planning and birth control. It is also a leading national organization in the field of educating the public concerning the danger to the United States and the world inherent in the continuing population growth.

The purposes of Planned Parenthood, among others, as stated in its presently effective Certificate of Incorporation include:

> "To undertake, support and promote investigation and scientific research touching upon and embracing the sociological, biological, medical and economic aspects of marriage, procreation, maternal health and family betterment, and to collect, circulate, evaluate and disseminate information concerning said subjects of investigation and scientific research and matters related thereto."

Article II of the Planned Parenthood By-Laws further states:

> "The purpose of the Federation shall be * * *
>
> (a) to provide leadership
>
> —in making effective means of voluntary fertility control, including contraception, abortion and sterilization *available and fully accessible to all* * * *" (emphasis supplied).

Planned Parenthood has adopted a policy statement pursuant to its purposes and binding on its affiliates, which states in pertinent part:

"1. *Everyone has the right to information on birth control, and access to family planning guidance and services.*

2. While all people should recognize the great responsibility they assume when they become parents, no one should be forced to use contraception or undergo sterilization or abortion. We must be especially vigilant to preserve freedom of choice about family size for those who are dependent on public or voluntary agencies * * *" (emphasis supplied).

Thus, Planned Parenthood is firmly committed to the principle that effective means of controlling fertility should be made available and be fully accessible to all persons who wish to use such means on a voluntary basis.

Planned Parenthood is the United States member of the International Planned Parenthood Federation, the leading international organization in the field of family planning and birth control and population education. The International Federation links national organizations for medical research and services in conception control in 70 member countries, cooperates with the United States and other governments, and is an accredited non-governmental agency to the United Nations Economic and Social Council. Planned Parenthood and its affiliates have tax exemption under §501(c)(3) of the United States International Revenue Code of 1954 as amended.

Through the national office and a number of committees, Planned Parenthood offers its affiliates, among other serv-

ices, guidance in the areas of medically directed child spacing by all methods of birth control, treatment of infertility problems and education for marriage and parenthood. Each of the affiliates functions under strict medical standards promulgated by the National Medical Advisory Committee in conjunction with the local medical advisory committees, all such committees consisting exclusively of physicians. Another division of the Federation is the Center for Family Planning Program Development. The Center is the technical assistance division of Planned Parenthood. It provides direct help to all types of agencies, public and private, in the family planning field in developing effective family planning programs.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers and provide for referral services to qualified medical specialists.

Planned Parenthood also operates as a clearing house for information and services relating to conception control. It formulates nation-wide medical and clinical standards and acts as an agency for public and professional education in this field. Its medical director and other consultants confer with medical school faculties and local committees in relation to teaching techniques, formation of clinics and the like.

Planned Parenthood encourages research by scientists in leading universities and laboratories and guides and assists in the clinical testing of contraceptive and birth control methods. It organizes conferences of experts in the

natural and social sciences and it collates information and research and fosters publication of articles in scientific journals.

The need for the provision of fertility control services including contraception without regard to marital status or age has been widely recognized by physicians, social workers, government administrators and others who deal continually with situations in which unwanted out-of-wedlock pregnancies have occurred. Although Massachusetts and Wisconsin are unique in proscribing contraceptive services for the unmarried, the importance of this case to Planned Parenthood and to individuals and organizations throughout the entire country cannot be underestimated, since these laws strike at the basis of Planned Parenthood's purpose and program to make voluntary parenthood possible for all. Whether or not one agrees with the Planned Parenthood tenets concerning the dangers of population growth, the need for the services promoted and supplied by Planned Parenthood in the United States and throughout the world today is, of course, overwhelming. Planned Parenthood thus files the attached brief in its capacity as the leading national health agency in the field of birth control, and as the United States affiliate of the international agency in the field of world-wide population problems.

The ruling by the Court of Appeals which Planned Parenthood supports but from which the Commonwealth of Massachusetts has appealed establishes that birth control services can and should be available to all residents of Massachusetts irrespective of marital status and that the statute limiting the distribution of contraceptives to mar-

ried persons and requiring a doctor's prescription even for non-prescription contraceptives unconstitutionally interferes with the fundamental rights of the people of Massachusetts. We believe that the Court of Appeals' decision is correct and that all Americans have the right to access to medically safe and effective family planning free of arbitrary and unreasonable state prohibitions.

## ARGUMENT

### POINT I

**The prohibition in the Massachusetts statute against rendering medical services in the field of contraception to unmarried persons regardless of their need or situation violates the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.**

This law (MASS. GEN. LAWS, Ch. 272, §§21, 21 A.) prevents physicians from prescribing articles to prevent conception for unmarried persons and interferes directly and substantially with constitutionally protected rights of privacy.

*Amicus* contends that the right of access to medical services for contraception is a fundamental right. Equally important, *Amicus* contends that the right of choice as to whether or not to conceive and bear a child is also a fundamental constitutional right. Moreover, the statute prohibits a physician from prescribing contraceptives for unmarried persons regardless of his judgment about their health needs. These rights are protected under the Fourteenth Amendment as well as the Fourth, Fifth and Ninth Amendments.

**A. The statute impairs the right to life by denying essential health services in violation of the Fourteenth Amendment.**

The due process clause of the Fourteenth Amendment expressly protects the individual's right to life against arbitrary government action. The law adopted by Massachusetts places many women at risk of serious injury, and in some cases even death, if they violate the law prohibiting fornication. The penalty for that crime is minor compared with the injury threatened by the statute's denial to the unmarried of medical services in the area of contraception. Clearly, the state could not constitutionally under the Eighth and Fourteenth Amendments impose the death penalty for fornication or render those who fornicate ineligible for public service. Yet, in effect, the Massachusetts statute held unconstitutional by the court below penalizes fornication by putting the unmarried who fornicate at risk of their health or life.

We submit that a state can not isolate lawbreakers from access to essential health services as a means of deterring them from crime. If the state of Massachusetts could deny medical treatment to individuals who violate the law against fornication, then it would seem to follow that the state could also deny other essential life-preserving services as deterrence against other violations of state law. On this basis, Massachusetts could decree that physicians may not treat the unmarried or prescribe for them drugs or devices for the prevention or cure of venereal disease. There is no real difference between such a statute and the one under challenge here which forbids access on the part of the un-

married to physicians and to health services, drugs and devices for contraception. By this statute, the state has created an additional punishment for fornication—a species of punishment abhorrent to a social system which values human life. As Judges Whittemore and Cutter stated in their dissenting opinion in the Supreme Judicial Court of Massachusetts in this case:

> "To say that the legislative purpose is to restrain non-marital intercourse would attribute to the Legislature an intention to use the risk of pregnancy as a deterrent to, or punishment of, such intercourse. To do so would be contrary to the result and reasoning in Commonwealth v. Corbett, 307 Mass. 7, 8-12. See State v. Baird, 50 N.J. 376, 383. * * * the damage caused by an undesired pregnancy to the unmarried parents, to the unwanted child, and to society as a whole, is so disproportionate to any possible benefit as to raise grave constitutional doubts about the validity of such a deterrent if intended."

In *People* v. *Belous*, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915 (1970), the Supreme Court of California, in considering the constitutionality of that state's restrictive anti-abortion statute, specifically found that if the law (which permitted abortions only where necessary to preserve the life of the woman) was read to require "certainty of death," the statute

> "would work an invalid abridgement of the woman's constitutional rights. The rights involved * * * are the woman's right to life and to choose whether to bear children. The woman's right to life is involved, because childbirth involves risk of death." *Id.* at 963; 80 Cal. Rptr. at 359; 458 P.2d at 199 (1970) (footnotes omitted).

The *Belous* case, it should be noted, specifically involved an abortion performed on an unmarried woman. The principle applied by the California court in *Belous* applies also, we submit, to contraceptive services, which differ from abortion only in that they may be used to prevent a pregnancy threatening to life or health, rather than to terminate pregnancy.

The Massachusetts statute contains no exception permitting doctors to treat an unmarried woman even where pregnancy would be dangerous to her life or health. Moreover, the Massachusetts courts, in cases construing this law before it was amended to permit contraception for married people, held that no exception to protect life or health could be read into the statute. *Commonwealth* v. *Gardner,* 300 Mass. 372, 15 N.E.2d 222, *appeal dismissed,* 305 U.S. 559 (1938). According to the Massachusetts courts, the ban on contraceptives was intended to promote public "morality," and Massachusetts apparently adheres to that view of the law insofar as it still applies to the unmarried.

Thus, it is apparent that Massachusetts has deliberately put its unmarried citizens in the position of forfeiting health and life protecting medical services if they violate the substantially unenforced laws against fornication. We believe that the Fourteenth Amendment precludes any state's taking such action. Thus, this Court stated in its decision in a case sustaining compulsory vaccination:

> "It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of health or body would be cruel and inhuman in the last degree. We are not to be understood as holding

that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 38-39 (1905).

**B. The right to determine whether or not to procreate is a fundamental right under established constitutional principles.**

Many decisions of this Court support the right of an individual to determine whether or not to bring children into the world. Some are grounded upon the constitutional right of privacy; others focus upon individual liberty under the due process clause of the Fourteenth Amendment. All, however, dictate the conclusion which the Court of Appeals reached in this case.

This Court has repeatedly recognized the individual's "indefeasible right of personal security, [and] personal liberty." *Boyd* v. *United States,* 116 U.S. 616, 630 (1886). Indeed, as long ago as 1891, this Court declared that,

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. As well said by *Judge* Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" *Union Pac. Ry Co.* v. *Botsford,* 141 U.S. 250, 251 (1891).

In subsequent decisions, this Court has reaffirmed the constitutional right of the individual with respect to procreation. Thus, in *Skinner* v. *Oklahoma,* 316 U.S. 535

(1942), the Court held that an Oklahoma statute which imposed sterilization upon persons convicted two or more times of larceny but not upon similarly situated persons convicted of embezzlement violated the equal protection clause of the Fourteenth Amendment. The Court emphasized that the statute involved "one of the basic civil rights of man," the right of procreation, and as such would be subject to "strict scrutiny." 316 U.S. at 541.

It is true that limitations on the right to control some uses of one's body have been permitted, as for example in *Jacobson* v. *Massachusetts, supra,* in which a compulsory vaccination law was held constitutional. However, in that case, the Court emphasized the necessity of the law in question to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. Even in that case, the Court noted that there would be exceptions to the compulsory vaccination law where the application of the statute "would be cruel and inhuman." *Id.* at 39. And, while in *Buck* v. *Bell,* 274 U.S. 200 (1927), the Court permitted compulsory sterilization in order to avoid a specific evil, the assumed inevitable birth of congenital imbeciles, the decisions in *Skinner* v. *Oklahoma, supra,* and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), cast doubt on some aspects of that case, even in the very narrow situation there presented.

More recently, in *Stanley* v. *Georgia,* 394 U.S. 557 (1969), this Court, in holding that a state law that punished the "mere private possession of obscene matter"[1] violated the First and Fourteenth Amendments, explicitly recognized as fundamental "the right to be free, except in very limited

1. 394 U.S. at 559.

circumstances from unwarranted governmental intrusions into one's privacy." 394 U.S. at 564. The Court emphasized that the rights asserted in *Stanley* were the individual's "right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U.S. at 565.

In addition to the decision in *Skinner* v. *Oklahoma, supra,* which recognized fundamental rights respecting procreation, this Court has acted on numerous occasions to protect from state interference the rights of the individual in matters relating to marriage, the family and sex. Thus the right to marry,[2] the right to direct the education of one's children,[3] and the right to marital privacy in connection with the use of contraceptives[4] have all been held to be fundamental under the Constitution.

The decision in *Griswold* v. *Connecticut, supra,* is of special importance to evaluation of the issues presented in this case. In *Griswold* five members of the Court based their decision on a right of marital privacy which was found to be within the penumbras of several of the provisions of the Bill of Rights. However, five of the Justices found that the Connecticut law was also invalid under the due process clause of the Fourteenth Amendment since it interfered with fundamental unenumerated rights.[5]

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2. *Loving* v. *Commonwealth,* 388 U.S. 1 (1967).

3. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923).

4. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

5. See *Griswold* v. *Connecticut,* 381 U.S. at 486-87 (Goldberg, J., Warren, C.J. & Brennan, J., concurring); *id.* at 499-502 (Harlan, J., concurring); *id.* at 502-07 (White, J., concurring).

In addition, Justice Goldberg's opinion in which Chief Justice Warren and Justice Brennan joined, emphasized that the Connecticut law violated the Ninth Amendment.

Many state and lower federal court decisions also support the contentions of *Amicus* that the rights asserted here, i.e., to medical services and to make one's own decisions as to procreation are fundamental. For example, decisions in many of the cases challenging restrictive anti-abortion statutes provide strong support for the Court of Appeals' holding.[6] And it should be borne in mind that even the most restrictive abortion laws permit abortion by physicians to save the life of the patient while the prohibition against contraception for the unmarried in Massachusetts contains no exception whatever.

In *People* v. *Belous, supra,* the California Supreme Court explicitly recognized a woman's fundamental constitutional right to choose whether or not to bear children stating:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. * * * That such a right is not enumerated in either the United States or California

6. In *United States* v. *Vuitch,* 91 S.Ct. 1294 (1971) this Court upheld the District of Columbia abortion statute as construed against a claim of vagueness and expressly declined to rule on the question of whether the woman has a constitutional right to determine whether or not to bear a child. These questions, however, are scheduled to be argued before this Court in *Doe* v. *Bolton,* 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 971); and *Roe* v. *Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 808), during the October 1971 Term.

Constitutions is no impediment to the existence of the right. * * *" 71 Cal.2d at 963-64, 80 Cal. Rptr. at 359-360, 458 P.2d at 199-200 (citations omitted).

Federal and state decisions in a number of other jurisdictions have followed the California Supreme Court and have recognized that abortion is a fundamental right of the same constitutional stature as the rights which were before this Court in *Loving* v. *Commonwealth*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, *supra*; *Skinner* v. *Oklahoma*, *supra*; *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). In these cases, state law restrictions on the reasons for which a woman could have an abortion were held unconstitutional. The courts found that such laws interfered with a woman's right to choose whether or not to bear a child. E.g., *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill.), appeals docketed, *sub nom. Hanrahan* v. *Doe* and *Hefferman* v. *Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523); *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 971); *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 808); *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970) (per curiam), appeal dismissed, 400 U.S. 1 (1970) (per curiam).[7]

In *Babbitz* v. *McCann*, *supra*, the Court held that

"The police power of the State does not * * * entitle it to deny a woman the basic right reserved to her under

7. *Contra*: *Corkey* v. *Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971); *Steinberg* v. *Brown*, 321 F. Supp. 741 (W.D. Ohio 1970); *Rosen* v. *Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), appeal docketed, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010).

> the ninth amendment to decide whether she should carry or reject any embryo which has not yet quickened." 310 F. Supp. at 302.

In *Roe* v. *Wade, supra,* plaintiffs contended "that the Texas Abortion Laws must be declared unconstitutional because they deprive *single women and married couples* of their right, secured by the Ninth Amendment, to choose whether to have children." 314 F. Supp. at 1221 (emphasis supplied). The three-judge court held, "We agree," and said

> "The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." 314 F. Supp. at 1221.

In *Doe* v. *Bolton, supra,* the Court stated that "the concept of personal liberty embodies a right of privacy which apparently is also broad enough to include the decision to abort a pregnancy,"[8] and ruled that the state could not limit the grounds for the performance of abortion. And in *Doe* v. *Scott, supra,* the three-judge court also held that the Illinois statute unduly infringed the woman's right to privacy.

The rights here involved are of at least the same magnitude as those recognized as fundamental in the cases we have already discussed, i.e., the rights relating to procreation,[9] marriage,[10] education,[11] and the use of contracep-

8. 319 F. Supp. at 1055.

9. *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

10. *Loving* v. *Commonwealth,* 388 U.S. 1 (1967).

11. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923).

tives.[12] Furthermore, this Court has vindicated other basic constitutional rights such as the right to travel abroad,[13] the right to travel from state to state,[14] and the right of private association, on a parity of reasoning.[15]

Lower courts have also recognized as fundamental rights the right to abortion as discussed above, and the right to control one's appearance,[16] and of course, the Court of Appeals in its decision in the instant case held the right at issue here to be a basic one.

**C. The fundamental character of the rights here involved.**

Concern for the dignity and privacy of the individual is at the core of the principles which have been established by the previous decisions of this Court referred to above. A corollary of that concern is a recognition that only a compelling need may enable a state to intrude on areas involving essential personal and private matters. Regardless of whether the state has a valid interest in regulating consensual sexual activity, it can have no valid interest in forcing people to have children or in denying them medical services in the area of contraception.

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12. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

13. *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

14. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *United States* v. *Guest*, 383 U.S. 745 (1966).

15. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

16. See, e.g., *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937 (1970); *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970).

This Court, we submit, cannot but take judicial notice of the fact that people do engage in extramarital sexual activities.[17] While those who do this may be violating the law, they have not given up their constitutional rights with respect to medical treatment and with respect to having children. These rights of privacy, the exercise of which is proscribed by the Massachusetts statute, are vital to the individual, to possible illegitimate children and to the community in which they live irrespective of the marital status of the individual concerned.

Any civilized society must acknowledge the harm done when individuals are denied access to existing medical techniques and services and are prevented from making decisions vital to themselves and their potential offspring.

Clearly a state must show a "compelling need" before denying individuals access to health care in any area. The risks of pregnancy are greatest, both to the woman and the child, in women under twenty or above thirty-five years of age.[18] The fact that in Massachusetts unmarried women of these ages are only exposed to the risk of pregnancy if they violate the law does not alter the need that exists for health services to protect against serious hazards. As pointed out above people who violate laws against fornication have never been thought to forfeit the right to medical treatment for venereal disease,[19] nor would such forfeiture be consistent with the applicable constitutional guaranties.

17. See note 43, *infra*.

18. See text and accompanying notes *infra* at 21-23.

19. See *Commonwealth* v. *Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940), See also *Commonwealth* v. *Goldberg*, 316 Mass. 563, 55 N.E.2d 951 (1944); *Commonwealth* v. *Werlinsky*, 307 Mass. 608, 29 N.E.2d 150 (1940).

**D. In view of the serious violations of constitutional rights caused by prohibiting the unmarried access to contraceptives, the statute can stand only if Massachusetts demonstrates that it is necessary to promote a compelling state interest.**

Since the right to medical treatment and to control fertility are of fundamental constitutional magnitude, Massachusetts bears a heavy burden of justification for the statute's prohibition of the distribution of contraceptives to the unmarried.

Generally, in cases involving a state prohibition of the exercise of fundamental personal rights, the burden of justification to be met by the state is a twofold one: the state must establish that the regulation in question is narrowly drawn, and that it is supported by compelling state interests.

The Attorney General in his brief argues that the burden is upon the appellee to demonstrate "that the statute does not bear a reasonable relationship to a proper object of legislative concern." Brief for Appellant at 10-11. It is clear, however, that the Attorney General in so arguing has ignored the fundamental nature of the rights of unmarried persons that are at issue here and is urging this Court to apply instead the test which is appropriate in cases, such as those involving economic regulation, in which fundamental personal rights are not at issue. The Court of Appeals in its decision from which the state of Massachusetts is appealing quite properly placed the burden of justification upon the state and found that this burden had not been met. See generally 84 *Note,* HARV. L. REV. 1525 (1971).

*Bates* v. *Little Rock*, 361 U.S. 516 (1960), a case involving the freedom of association, contains a clear statement by this Court of the applicable test in cases such as the instant one:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *National Asso. for Advancement of Colored People* v. *Alabama*, 357 U.S. 449. See also *Jacobson* v. *Massachusetts*, 197 U.S. 11, 49; *Schneider* v. *Irvington*, 308 U.S. 147; *Cox* v. *New Hampshire*, 312 U.S. 569; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Prince* v. *Massachusetts*, 321 U.S. 158; *Kovacs* v. *Cooper*, 336 U.S. 77." 361 U.S. at 524.

In addition to serving a compelling state interest, a law such as the one here involved must be narrowly drawn. Thus, "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.' *NAACP* v. *Alabama*, 377 U.S. 288, 307." *Griswold* v. *Connecticut*, *supra* at 485.

There can only be two even hypothetical state interests for refusing unmarried people who are sexually active access to contraceptives. Conceivably there could be first, an interest in health on the theory that contraceptives may be harmful to the user and second, the interest (which appears now to be stressed by Massachusetts) in protecting public morals.[20]

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20. Although the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Baird*, 355 Mass. 746, 247 N.E.2d 574 (1969) did not rest its decision on the marital status of the recipient of the contraceptive substance but rather on the status of the distributor, both questions are necessarily presented in this case. Moreover,

Before examining the particular state interests asserted here, we wish to call the Court's attention to the relevant facts. They demonstrate severe injury to society and to the individuals concerned when children are conceived by the unmarried.

### (1) The Nature and Scope of the Problems Presented by Extra-marital Pregnancy

The effects of out-of-wedlock pregnancies and births are disastrous for all concerned.[21] When an unmarried girl or woman becomes pregnant she is faced with a number of alternatives, many of which depend upon her economic status. In some cases, she may marry after conception occurs, and thus an illegitimate birth is prevented. Such forced marriages, often between immature young people, frequently lead to divorce or desertion. If the pregnant woman does not marry, she may, if she has sufficient funds, travel from Massachusetts to another state to obtain a medically safe legal abortion. Of course, if she is young and/or ignorant and/or poor, she may resort to dangerous techniques of self-abortion or may seek the "services" of

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the Massachusetts court, subsequent to the decision of the Supreme Judicial Court of Massachusetts in this case has specifically upheld the ban on prescription and distribution of contraceptives to the unmarried. In *Sturgis* v. *Attorney General*, —— Mass. ——, 260 N.E.2d 687 (1970), which was decided one week before the Court of Appeals handed down its decision in the instant case, the Supreme Judicial Court of Massachusetts in a suit by physicians for declaratory relief upheld the constitutionality of the statute under attack here on the ground that it is a legitimate protection of public health as well as on the "more compelling ground" that it discourages extra-marital relations. *Id.* at ——, 260 N.E.2d at 690.

21. See *Baird* v. *Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970); *Commonwealth* v. *Baird*, 355 Mass. 746, 758, 759, 247 N.E.2d 574, 581, 582 (1969) (dissenting opinion of Justices Whittemore and Cutter; dissenting opinion of Justice Spiegel).

an unskilled quack abortionist and serious injury or even death may result.

If the woman does not obtain an abortion (legal or illegal), does not marry, and bears the child, the costs to her, to the illegitimate child and to society are incalculable.

For the unmarried mother, the likelihood of becoming a school dropout, economically dependent, poverty stricken and trapped is obvious. One student of these problems has stated:

> "The timing of the first birth is of crucial strategic importance in the lives of young women because the need to take care of a baby limits severely their ability to take advantage of opportunities that might have changed their lives for the better. In this regard, the problems posed by birth to the unmarried woman are especially serious. The girl who has an illegitimate child at the age of sixteen suddenly has ninety percent of her life's script written for her. She will probably drop out of school. * * * She will probably not be able to find a steady job that pays enough to provide for herself and her child, she may feel impelled to marry someone she might not otherwise have chosen. * * * Had she been able to delay the first child, her prospects might have been quite different, assuming that she would have had opportunities to continue her education, improve her vocational skills, find a job. * * *"[22]

In addition, the unavailability of contraception and the occurrence of illegitimate births has marked adverse ef-

22. Campbell, "The Role of Family Planning in the Reduction of Poverty," 30 J. MARRIAGE AND THE FAMILY 236, 245 (1968). See also Sarrel, "The University Hospital and the Teenage Unwed Mother" (mimeo), quoted in Guttmacher, "How Can We Best Combat Illegitimacy?", MEDICAL ASPECTS OF HUMAN SEXUALITY, March, 1969 at 59.

fects upon the health of the unmarried mother and her child. These effects include: a higher death rate for infants born out of wedlock than for infants born in wedlock and a higher proportion of premature births out of wedlock than in wedlock.[23] The higher rates of prematurity and infant mortality in out-of-wedlock births are in turn associated with a lack of prenatal care.[24] A higher maternal death rate has also been associated with out-of-wedlock pregnacies.[25]

The failure of the unwed mother to obtain adequate prenatal care is in turn related to health hazards for the infant. In addition to higher rates of prematurity amongst illegitimate infants,[26] statistics show higher infant mortality rates during the first year for the illegitimate child.[27] Also important because of the frequency with which illegitimate births occur to adolescents, is the direct relation between early childbearing and the risk of particular diseases to offspring[28] and the risk of maternal death.[29]

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23. R. BERNSTEIN & E. HERZOG, "Health Services for the Unmarried Mother," United States Department of Health, Education and Welfare, Welfare Administration (Children's Bureau), 2, 4 (1964).

24. *Id.* at 2, 11. The chief reason for the unmarried pregnant woman's failure to obtain adequate prenatal care is her desire to conceal the pregnancy. *Id* at 12.

25. *Id.* at 4.

26. See R. BERNSTEIN & E. HERZOG, *supra*, note 23 at 4; Anderson, Jenss, Mosher & Richter, "The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births," 56 AM. J. PUB. HEALTH 1868, 1869 (1966).

27. *Id.* at 1870.

28. One study found "significantly elevated risks of intracranial and spinal injury at birth, postnatal asphyxia, atelectasis and club foot among children from very young mothers." Newcombe & Tavendale "Maternal Age & Birth Order Correlations." I MUTATION RESEARCH, 446, 452 (1964). There are also special risks to children born to

Finally, it has been found that child abuse and neglect is a long-range result of unwanted births to women.[30]

The illegitimacy rates in the United States are high and they are increasing.[31] In 1968 the estimated number of

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women who are over 35, including mental deficiency disorders, mongolism, cerebral spastic infantile paralysis, congenital malformations of the circulatory system, intracranial and spinal injury at birth and postnatal asphyxia. *Ibid.*

29. It is also reported that "Generally maternal risk increases with decreasing maternal age below 20, and increases with increasing maternal age above 30." Perkin, "Assessment of Reproductive Risk in Nonpregnant Women," 101 AM. J. OBSTETRICS & GYNECOLOGY 709, 710 (1968).

30. See D. GIL, VIOLENCE AGAINST CHILDREN—PHYSICAL CHILD ABUSE IN THE UNITED STATES (1970). Gil reports that the victims of abuse are often unwanted children who live primarily in households headed by women, that is by women who are unmarried, widowed, divorced or separated. *Id.* at 146. Gil also found that 29 percent of the abused children revealed deviations in social interaction and general functioning, 14 percent suffered from deviations in physical functioning, 8 percent revealed deviations in intellectual functioning, and that over 13 percent of the school age children in a sample of physically abused children attended special classes for retarded children or were in grades below their age level. *Id.* at 107.

31. See Yurdin, "Recent Trends in Illegitimacy—Implications for Practice," 49 CHILD WELFARE 373-375 (1970); Cutright, "Illegitimacy: Myths, Causes and Cures," PERSPECTIVES (Special Feature), January 1971, at 26-27.

The increasing rates of illegitimacy are further documented by Ventura who reports that,

> "All measures of illegitimacy increased over the period from 1940 to 1966. The estimated number of illegitimate births more than tripled from 89,500 to 302,400; the illegitimacy rate rose from 7.1 per 1,000 unmarried women 15 to 44 years of age to 23.4 births per 1,000; and the proportion of illegitimate births to all live births increased from 3.8 to 8.4 percent."

Ventura, "Recent Trends and Differentials in Illegitimacy," 31 J. MARRIAGE AND THE FAMILY 446 (1969). See also, A. CLAGUE & S. VENTURA, TRENDS IN ILLEGITIMACY: UNITED STATES 1940-1965, NATIONAL CENTER FOR HEALTH STATISTICS, VITAL HEALTH STATISTICS, PUBLIC HEALTH SERVICE PUBLICATION No. 1000, SERIES 21 (No. 15) (1968).

illegitimate live births in the United States was 339,200.[32] The bulk of these illegitimate pregnancies occurred in females between the ages of 15 and 24.[33] These figures, however, by no means give a complete picture of the number of out-of-wedlock conceptions that occur, since they fail to take into account the following factors, among others: out-of-wedlock pregnancies that are terminated by legal or illegal induced abortion or by spontaneous miscarriage; out-of-wedlock pregnancies that are successfully concealed; out-of-wedlock pregnancies that result in forced marriages and legitimate births; and out-of-wedlock pregnancies that result in the delivery of still-born infants.

The extent to which premarital conception is not reflected in illegitimate births is revealed in a survey conducted by the National Center for Health Statistics.[34] The

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32. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIVISION OF VITAL STATISTICS, PUBLIC HEALTH SERVICE, MONTHLY VITAL STATISTICS REPORT—TABLE 10: "Estimated number of illegitimate live births and ratios by age of mother and color—United States [Based on a 50 percent sample of births]" (1968). See also Yurdin, *supra* note 29 at 373-375.

33. The distribution by age of the illegitimate births in 1968 was as follows:

| | |
|---|---|
| under 15 years | 7,700 |
| 15 - 17 years | 77,900 |
| 18 - 19 years | 80,100 |
| 20 - 24 years | 107,900 |
| 25 - 29 years | 35,200 |
| 30 - 34 years | 17,200 |
| 35 - 39 years | 9,700 |
| 40 years and over | 3,300 |

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *supra* note 32. YURDIN, *supra* note 31 at 375.

34. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, "National Natality Survey," Monthly Vital Statistics Report Volume 18, No. 12 (Supplement 1970) at p. 1 (hereafter "NATIONAL NATALITY STUDY").

report shows that one-third of all first born children in the United States in the years 1964 to 1966 were conceived out of wedlock.[35] Twenty-two percent of all first births occurred less than 8 months after marriage.[36]

This 1964-1966 National Natality Survey made the following finding:

> "If the assumption is made that the first births tabulated as being within eight months of first marriages were indeed premarital conceptions, then the data from the * * * survey indicate that of the average 1,174,000 first births to women aged 15-44 which occurred in the United States each year during 1964-1966, 166,000 or 14 percent were illegitimate and 218,000, or 19 percent were premarital conceptions of legitimate babies.
>
> "Thus, an annual average of 384,000 or 33 percent of the first births during those years were conceived outside marriage."[37]

The study also showed that the proportion of births occurring within 8 months of marriage rose as income fell,[38] and that the highest proportion of births to women married for a period of less than eight months was among those women who had from one to three years of high school.[39]

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35. *Id.* at 2.

36. *Id.* at 1.

37. *Id.* at 3. Some 31% of white and 54% of non-white first births [in Massachusetts] occurring in 1966-1968 were non-maritally conceived, that is, were either born out-of-wedlock or were pre-maritally conceived. MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, SUMMARY OF STUDY OF RELATIONSHIP BETWEEN MARRIAGE, CONCEPTION AND FIRST BIRTH IN MASSACHUSETTS WOMEN 4 (1971).

38. NATIONAL NATALITY STUDY at 3 (Table 3).

39. *Id.* at 4 (Table 4).

**(2) The interests asserted by Massachusetts are not compelling.**

An examination of the asserted interests in health and morals reveals that they do not meet the constitutional standards set forth above.

***a. No health purpose is served by this law.***

There is obviously no state interest, compelling or otherwise, in preventing unmarried people from using the same contraceptive drugs or devices which the state allows to be disseminated to the married. As the opinion of the Court of Appeals makes abundantly clear, so far as any alleged health purpose is concerned, the statute is arbitrary and capricious. The irrationality of a claimed health purpose is readily apparent. Clearly, any health interest that the state might have in preventing use of contraceptives is unrelated to the marital status of the recipient of the contraceptive article. Any possible adverse side effects of a contraceptive is the same for all users, married or unmarried.

Thus, as the Court of Appeals held, the asserted health basis for the Massachusetts law's discrimination against the unmarried is without any conceivable rational basis.

***b. Whatever interest Massachusetts may legitimately have in regulating sexual conduct cannot justify the ban on contraception for the unmarried.***

Massachusetts argues that the proscription against distribution of contraceptives to unmarried persons is justified as a means of promoting public morals by deterring fornication and adultery. Brief for Appellant at 14-17. Obviously, adultery, the more serious offense, is not deterred

by this law since married persons have access to contraceptives irrespective of whether or not they engage in illicit relationships.

The Court of Appeals in the instant case found that the statute never had as its purpose the deterrence of fornication. The court's conclusion was based in part on the disparity in penalties for fornication and for violation of the anti-contraception statute, since fornication is a misdemeanor punishable by not more than a thirty-dollar fine or three months in jail,[40] whereas violation of the anti-contraception law is a felony for which the maximum punishment is imprisonment for up to five years in the state prison.[41] The court also relied on the fact that before the statute was amended in 1966, its provisions applied to the married as well as the unmarried. 429 F.2d at 1401. The Court of Appeals thus concluded that:

> "so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration.
>
> "To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state." 429 F.2d at 1401-02 (citations omitted).

40. MASS. GEN. LAWS ch. 272, §18.

41. MASS. GEN. LAWS ch. 272, §21.

However, even assuming *arguendo* that the Court of Appeals' finding with respect to deterrence of fornication as the purpose of the statute was incorrect, or put another way, that at least today (as opposed to a time prior to the *Griswold* case) the purpose of the statute is to deter fornication, *Amicus* submits that the state's interest in deterring fornication is not sufficiently compelling to justify the extremes adopted in this statute, and that in any event there is no reasonable basis for believing that the stringent measures adopted by Massachusetts have deterred or will deter fornication.

Moreover, the state cannot claim that an interest in deterring fornication justifies creating a situation which leads inevitably to illegal abortion, illegitimacy, unwanted births and serious health hazards.

Although the subject of the validity of "morals" legislation has been long debated,[42] it is not necessary for the decision of the present case to rule on the constitutionality of state laws proscribing fornication and adultery.

Assuming the validity of state laws prohibiting such extra-marital acts, may the state in light of the dubious efficacy of its attempts to prevent such conduct[43] resort to

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42. Compare H. L. A. HART, LAW, LIBERTY, AND MORALITY (1963) with P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). See also Dworkin, "Lord Devlin and the Enforcement of Morals", 75 YALE L. J. 986 (1966); Henkin, "Morals and the Constitution: The Sin of Obscenity", 63 COLUM. L. REV. 391 (1963).

43. In Kinsey's fifteen-year study of sexual behavior of 5,940 white women, it was discovered that nearly 50 percent of the women had had coitus before they were married. A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE at 286 (1953). The data show a general trend from prior to

harsh and punitive measures, such as here involved which collide with fundamental individual rights—the right to control fertility.

In our view, any hypothetical deterrent effect of the statute (which effect has not been established by appellant here) is insufficient to justify such a state regulation; it is not necessary to promote a compelling state interest nor, as against today's facts does it have as was pointed out by the court below, any rational basis.

We suggest that this Court's analysis of the issues presented in *Stanley* v. *Georgia, supra,* indicates why the decision of the Court of Appeals should be affirmed.[44] In

---

1920 to 1949 of an increase in premarital sexual activity in all age groups. *Id.* at 339 (Table 83).

Studies conducted subsequent to Kinsey's, although smaller in scope, confirm that in the last two decades the trend of increasing premarital sexual intercourse is being maintained. One study of 1,393 college students across the country contained the following observation: "About 27% of Kinsey's college-educated females reported they had experienced coitus by the time they were 21 years old. In contrast, 43% of the 21-year-olds in our United States college sample reported they were coitally experienced. That is an increase of nearly 60%." V. PACKARD, THE SEXUAL WILDERNESS at 161 (1968). See also Bell & Chaskes, "Premarital Sexual Experience Among Coeds—1958 and 1968," 32 J. MARRIAGE AND THE FAMILY 81-84 (1970).

In an earlier study of the sexual behavior of the male population of the United States, it was found that: "In every age group between 16 and 50, more than half (from 70.5% down to 51.3%) of the single males engage in heterosexual intercourse" and that "the highest incidence of premarital intercourse comes in the late teens where nearly three-quarters (70.5%) of the total U.S. population is involved. . . ." A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 249 (1948). It is probable that these figures would be higher today.

44. The recent decisions of this Court in *United States* v. *Thirty-Seven Photographs,* 91 S.Ct. 1414 (1971) and *United States* v. *Reidel,* 91 S.Ct. 1410 (1971), in no way affect the significance of the privacy aspects of *Stanley* v. *Georgia* as they bear upon the instant case.

*Stanley*, the state claimed the right to bar "the mere possession by the individual in the privacy of his own home"[45] of obscene materials on two grounds. First, the state asserted that exposure to obscene materials may lead to the commission of crimes of sexual violence and to deviant sexual behavior. This Court noted that "[t]here appears to be little empirical basis for that assertion" and emphasized that under the circumstances, "the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of the law." 394 U.S. at 566-67. Second, the state claimed "that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution." 394 U.S. at 567.

The answer of this Court to that argument is specially relevant here:

> "That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. *Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.* 394 U.S. at 567-68 (citation omitted) (emphasis supplied).

Here, as in *Stanley*, there is scant basis for assuming that forbidding dissemination of contraceptives for the unmarried will have any impact on the sexual mores of the citizen. But even if *some* deterrence of "immoral" con-

45. 394 U.S. at 568.

duct is assumed, the state may take steps against fornication without adopting the essentially totalitarian rule of forcing women to bear illegitimate children if they fail to observe those laws. Massachusetts may not point to "the need to ease the administration of" the fornication laws as the justification for its drastic restriction on the individual's fundamental rights to control conception.

Moreover, in considering whether deterrence of the conduct made criminal by the fornication and adultery statutes may be sought also by prohibiting distribution of contraceptives to the unmarried, it is highly relevant that the conduct sought to be deterred takes place in private with the consent of the individuals concerned and that the harm said to result from such conduct is the generalized disruption or endangering of the moral fabric of society.

It is difficult to see the "compelling" need to supplement the laws against fornication by a means which is more likely than not to result in more illegitimate children and/or in an increase in the illegal abortion rate.

Thus, in the light of these facts and of the limited utility of the anti-contraception law as a deterrent, it strains credulity to be told that the state has a compelling "morals" interest in denying contraceptives to the unmarried. Rather, it seems to be the case that the legislative purpose was to make an unwanted pregnancy the penalty for illicit intercourse. In this connection, we call the Court's attention to the statement made in the concurring opinion in *Baird* v. *New Jersey* by the Chief Justice of New Jersey:

"If it is suggested that the Legislature meant to impede illicit intercourse rather than to illegalize contraception as such, I could not accept that view of the legislative intent. That thesis would assume the legislature intended pregnancy * * * to serve either as a restraint upon illicit affairs or as punishment for them. In my view, the social gain from the deterrence achieved is not worth the tragedy of unwanted pregnancy * * * in the cases in which the statute fails in that purpose; and to prescribe such pregnancy * * * as punishment for illicit intercourse would be a monstrous thing." 50 N.J. 376, 383, 235 A2d 673, 677 (1967) (concurring opinion of Chief Justice Weintraub).

If Massachusetts is truly concerned with deterring fornication and adultery, it can deal with these offenses by means of the statutes which directly proscribe that conduct. Thus, we submit there is no ground for holding that the interest of Massachusetts in deterring fornication by means of denying contraceptives to the unmarried is compelling or indeed even rationally based. Nor can prevention of illicit sexual activity be constitutionally achieved by a regulation whose effect on fundamental rights is as totally destructive of these rights as is this statute.

## POINT II

**The Massachusetts requirement for a doctor's prescription for all contraceptives disseminated to all users, married or unmarried, is overbroad and violates the fundamental rights of individuals under the Fourth, Fifth, Ninth and Fourteenth Amendments.**

The right of all persons, married or unmarried, to have access to contraception is fundamental and protected by the Fourth, Fifth, Ninth and Fourteenth Amendments. *Griswold* v. *Connecticut, supra,* established this for the married; and as we have shown in Point I, this right applies also for the unmarried.

The Massachusetts law mandates a doctor's prescription before any person in Massachusetts may obtain any contraceptive. Yet there are certain types of contraceptives such as condoms, foams and jellies which require no prescription under applicable federal regulation. Massachusetts is, so far as we know, the only state of all 50 which singles out those contraceptives which are generally "non-prescription" and requires that the user obtain them from a doctor.

We submit that there can be no rational justification for such a requirement and that its only purpose is to discourage or inhibit the use of contraception. Such a purpose is constitutionally impermissible. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618 (1969). As the Court of Appeals noted, no health purpose is served by requiring a prescription for this kind of contraceptive. There is no showing whatsoever that Massachusetts has any basis for determining or

has in fact determined that these contraceptives require the intervention of a physician before they can safely be distributed to the public.

The decision of the Court of Appeals that the statute in this aspect is overbroad seems to us unassailable. It is clear that enforcement of this requirement will substantially impair the basic rights of individuals, married or unmarried, and as this Court has held: "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.' *NAACP* v. *Alabama,* 377 U.S. 288, 307." *Griswold* v. *Connecticut, supra* at 485.

An individual who wishes to practice contraception may have no relationship with a private physician—either because of lack of funds or other circumstances—and may live in a geographic area in which there are no health facilities readily available. A requirement that such person obtain a doctor's prescription for any and all contraceptives thus can for all practical purposes foreclose the right to practice contraception. This occurs despite the fact that such person's health needs, as well as his or her personal desires, may make any pregnancy an unwanted or dangerous one, irrespective of marital status.

Massachusetts, in an effort to justify as a "health measure" the burden placed by the state on the distribution of *all* contraceptives, quotes indiscriminately from literature which deals with both prescription and non-prescription articles and substances.[46] As to many of these devices and

46. Brief for Appellant at 11-13.

substances, such as the IUD, the diaphragm, and the birth control pill, no argument is made by anyone against the federal requirement that they be dispensed only on prescription. However, that articles such as condoms, foams, and jellies, like non-contraceptive preparations dispensed without prescription, may cause irritation in some cases and may occasionally, after they are used, require a physician's intervention does not without more provide a basis for any initial requirement that a prescription be obtained. There are few preparations which are without possible adverse effects on some people. Aspirin, for example, has been known to cause serious medical difficulties in some cases, yet no effort has been made by the Massachusetts legislature or anyone else to require prescriptions for such items.

That the medical prescription requirement has no relationship to a health purpose is demonstrated clearly when the situation with respect to the distribution of condoms is considered. No prescription is required in Massachusetts when condoms are bought for the purpose of preventing venereal disease. See *Commonwealth* v. *Corbett*, 307 Mass. 7, 29 NE. 2d 151 (1940). It is irrational to suppose that there is need for a physician's prescription when the purpose for which the condom is to be used to to prevent pregnancy, but not when the purpose is to prevent venereal disease. The same holds true for various products which are sold freely for "feminine hygiene" without a doctor's prescription, but which, if sold for "contraceptive purposes," require such prescription under Massachusetts law.

Since it is obvious that for these and other types of contraceptives there is no possible need for the intervention of a physician, the Massachusetts requirement is arbitrary, capricious and overbroad as well.

## POINT III

**The Massachusetts statute violates the equal protection clause of the Fourteenth Amendment both in its prohibition of distribution of contraceptives to unmarried persons and in its requirement of a doctor's prescription for all users, both married and unmarried.**

### A. The Massachusetts law discriminates invidiously against the poor.

In *Griswold* v. *Connecticut, supra,* Mr. Justice White in his concurring opinion observed:

> "[T]he clear effect of these statutes as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up to date information in respect to proper methods of birth control. * * * In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. * * *" 381 U.S. at 503 (citations omitted).

That statement is equally applicable to the impact of the Massachusetts law on the poor. This impact is a twofold one. In the first place, since the law requires a doctor's prescription for all contraceptives, poor women irrespective of their marital status are faced with an often insurmountable obstacle to access to contraception because they are unable to obtain a physician's services. Second, insofar as the law permits contraceptive services for the married, it unequally burdens the married poor in its operation. This Court can take judicial notice of the unequal distribu-

tion of health services which exists throughout the United States and of the effect that the inadequate number of doctors available to service the public has upon the availability of direct physician service to the poor. The fact that medical service is not readily available to the poor is demonstrated in the context of fertility control in a recent report of the Senate Committee for Labor and Public Welfare which states:

> "Problems of unwanted children do not occur only in low income and less educated families in this country, but the consequences are greater in this group because of the accumulation of difficulties this condition imposes upon the poor. * * *
>
> * * * Medically indigent families (defined according to poverty levels established by the Social Security Administration) have an average annual fertility rate 53 percent higher than the non-poor. The couple with funds to purchase health care has relatively easy access to family planning services. The medically indigent couple—usually dependent on public and voluntary agencies for health care—is forced to do without, or to rely heavily on the least effective non-medical techniques for fertility control unless they happen to reside in an area where family planning services are made readily available by public health services or voluntary agencies.
>
> A number of studies have established the existence of a group totalling about 5 million medically indigent women in the United States of child-bearing age having a need for subsidized family planning services." Sen. Rep. No. 91-1004, 91st Cong., 2d Sess. 9 (1970) (footnote omitted).

Moreover, the prohibition against dissemination of contraceptives to the unmarried also discriminates against poor

unmarried people. The middle class or wealthy woman who is unmarried can easily go out of state for contraceptive services. It seems likely that she is also in a position to persuade her private physician to provide the needed prescriptions and/or service. But the poor cannot do this.

The impact of this law—both with respect to the requirement for a doctor's prescription and with respect to restricting contraceptives to married persons—is thus grossly discriminatory in its impact on poor people.

It is immaterial whether or not this discrimination results from a conscious state policy, for the state has consciously adopted a statute which inexorably leads to discrimination against the indigent. Accordingly, under the principles which this Court applied in *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963), and *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Massachusetts law violates the equal protection clause of the Fourteenth Amendment.

**B. The law discriminates against women as opposed to men who violate the laws against fornication.**

Not unlike the situation before this Court in *Skinner* v. *Oklahoma, supra*, the impact of this law falls unequally on those similarly situated. It imposes a harsh penalty on women who violate the laws against fornication by putting them at risk of unwanted pregnancy, health hazards and the birth of illegitimate children, yet their male partners, equally guilty of fornication, are not burdened by forced conception in any comparable manner.

The Massachusetts law, as we have discussed above in Point I, *supra,* impinges on fundamental constitutional rights. Thus, under *Skinner* it is subject to at least "strict scrutiny," if not to the requirement enunciated by this Court in *Shapiro* v. *Thompson, supra,* that it must be shown to be necessary to promote a compelling governmental interest.

Even if the less stringent test of equal protection—that applicable to other than "fundamental" rights—were considered, *Amicus* contends that there is no reasonable basis for this result in terms of the state's alleged justification of the law, deterrence of fornication, since the state can, as indicated above, proceed directly against all who engage in fornication without invidiously singling out one category for extremely harsh treatment, indeed treatment which amounts to exposing women to a double penalty.

## Conclusion

We submit that under the principles of past cases decided by this Court, the Massachusetts statute unconstitutionally interferes with fundamental individual rights and that no compelling need or rational justification can be urged for the prohibition against contraceptive services to the unmarried and the absolute denial to them of medical services in the area of contraception. In addition, the requirement that all contraceptives for married persons be prescribed by a physician is arbitrary and discriminatory as well as overbroad.

For all of the reasons stated in this brief *Amicus* respectfully urges that the judgment of the Court of Appeals declaring the Massachusetts anti-contraception law unconstitutional be affirmed in all respects.

June, 1971

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 804

THOMAS S. EISENSTADT,
As he is Sheriff of Suffolk
County, Massachusetts,
APPELLANT,

*v.*

WILLIAM R. BAIRD,
APPELLEE.

## ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR THE APPELLEE

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### The Opinions Below

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at 429 F.2d 1398 (1st Cir. 1970) (A. 47). The opinion of the District Court

is reported at 310 F. Supp. 951 (1970) (A. 35). The opinion of the Massachusetts Supreme Judicial Court is reported at 355 Mass. 746, 247 N.E. 2d 574 (1969) (A. 17).

## Jurisdiction

The civil action in the United States District Court for the District of Massachusetts was commenced by the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. sec. 2241 (A. 7). After hearing, the court dismissed the petition (A. 4). Thereupon, the plaintiff (appellee herein) appealed to the United States Circuit Court of Appeals for the First Circuit (A. 12). After hearing, that court on July 6, 1970, vacated the order of the District Court and remanded the action thereto with instruction to grant the writ of habeas corpus (A. 47). Timely notice of appeal was filed with the Court of Appeals for the First Circuit on July 15, 1970 (A. 14).

Probable jurisdiction was noted by this court on March 1, 1971 (A. 6).

## Statutes Involved

The Massachusetts statutes involved are Mass. G.L. c. 272, § 21, as amended by Acts of 1966, c. 265, § 3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet,

advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

And Mass. G.L. c. 272, § 21A, as inserted by Acts of 1966, c. 265, § 1, which provides:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles be means of any vending machine or similar device."

## Question Presented

1. Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional on its face as vague, arbitrary, discrimina-

tory, overbroad, or lacking legitimate legislative purpose to the extent that it makes unlawful to give away to unmarried persons medicines and other articles for the prevention of conception?

## Statement of the Case

In April, 1967, William R. Baird, the appellee herein, pursuant to an invitation, addressed a group of students at Boston University. Mr. Baird is not a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse. On a demonstration board he exhibited various contraceptive devices and at the close of his lecture he invited members of the audience, with none of whom he had any medical professional relationships, to come and help themselves. He personally handed a young lady a package of vaginal foam. There was no evidence that he knew the woman before-hand. He was thereupon arrested and charged with exhibiting and delivering a contraceptive article (A. 6). The appellee was indicted and convicted of exhibiting and distributing contraceptive devices in violation of Mass. G.L. c. 272, § 21. On appeal, the Massachusetts Supreme Judicial Court unanimously held that the conviction for *exhibiting* contraceptive articles violated Mr. Baird's First Amendment rights. However, by a 4-3 majority, the court upheld the constitutionality of the provision against *delivering* as beyond the realm of free speech. *Commonwealth* v. *Baird*, 355 Mass. 746 (May 1, 1969) (A. 17). On January 12, 1970, the United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts*, 396 U.S. 1029 (1970). Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the District of Massachusetts (A. 71). Following a hearing, the petition was dismissed with opinion. *Baird* v. *Eisenstadt*, 310 F.

Supp. 951 (1970) (A. 35). A claim of appeal having been filed, the United States Court of Appeals for the First Circuit issued a certificate of probable cause and ordered the appellee herein released on bail (A. 13). After a hearing, the Court of Appeals entered a judgment vacating the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus discharging Mr. Baird, *Baird* v. *Eisenstadt*, No. 7578 (1st Cir. July 6, 1970) (A. 47).

The appellant filed a notice of appeal to this court on July 21, 1970 (A. 14), and on March 1, 1971, this court noted probable jurisdiction (R. 6).[1]

## Argument

### I. The Massachusetts Birth Control Laws Violate Due Process Of Law In That They Constitute An Unwarranted Invasion Of Privacy.

Although neither the State nor the Federal Constitution refers to a right of privacy in express terms, the principle of safe-guarding private areas of a citizen's life has always been a matter of vital and primary concern.

Article I of the Declaration of Rights in the Constitution of this Commonwealth (pre-dating the United States Constitution), provides in its pertinent part:

> "All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of ... defending their lives ... and obtaining their safety and happiness."

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[1] It should be noted that the Commonwealth's Statement of Facts incorrectly states that the Appellee personally handed an "unmarried" adult woman the package of vaginal foam.

In *Griswold* v. *State of Connecticut*, 381 U.S. 479 (1965), the Court reviewed cases suggesting that, "... specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance..." (p. 484). The Court went on to explain that although the Constitution nowhere refers to a right of privacy in express terms, the:

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" (p. 484)

See also, *Beany, the Constitutional Right to Privacy*, 1962 Sup. Ct. Rev. 212; *Griswold, The Right to be Let Alone*, 55 N.W.U.L. Rev. 216 (1960).

In the instant case, we are also concerned with a fundamental right older than the Bill of Rights — older and more cherished even than the marriage relationship. We concern ourselves here with the right to health, to social and economic well-being and, indeed, the right to life itself. The argument of the moralist is no more effective against the unalienable right of the citizen to protect his

health or life, than it was in its assault on the sanctity of the marriage relationship concerned in the *Griswold* case.

This is not to say that the legislature has no right to regulate morals, anymore than the court in *Griswold* was saying that the legislature could not proscribe an act directly and reasonably relating to that purpose. We concede the desirability of regulation that will enhance morals and diminish sexual promiscuity.

The question is: Does this legislation "sweep unnecessarily broadly and thereby invade the area of protected freedom" we speak of here?

> "Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom."
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> *N.A.A.C.P.* v. *Alabama*, 377 U.S. 307; *Griswold*, *supra*, p. 484

As we shall see, it is grossly inadequate to argue that we can all agree that the unmarried should not fornicate, and the married shall adhere to their vows. We have statutes providing punishment for those and related misadventures, and those statutes are not under attack here. How compelling is the need for G.L. c. 282, §§ 20, 21 and 21A to the desirable ends above mentioned? To what extent are natural rights interfered with by this legislation — and are the restrictions no greater than necessary to further a proper legislative goal? What immediacy should prompt this Court to exercise judicial intervention with a legislative action? What demonstrably, can we expect to happen if these proscriptions are removed? It is not too

ready and glib an answer to say that all the evils complained of can be avoided by abstinence?

None of these complex questions are easily provided with answers. But some answers are available and we suggest them here.

All authorities agree that statistics and estimates underestimate the full extent of tragic consequences that ensue from illegitimacy. This is due in part from the recognizable fact that many illicit pregnancies are not reported, especialy amongst middle and upper class income groups and the apparent reluctance of some agencies to cooperate with those who have an interest in gathering data. Responsible studies, however, have been made that give some insight into the problems that arise. All of these studies clearly illustrate the tragic result to the unwed mother, the unwanted child, and the enormous cost, both social and in dollars to the community. (The cost to the male counterpart responsible for these unwanted pregnancies, does not appear to have been the subject matter of any extensive study. It is only reasonable to speculate, however, that there are related consequences substantially out of proportion to the illicit behavior they have engaged in.)

With no intention to suggest a canvass of all available materials, some representative summaries of pertinent data follows:

## A. *Is "Abstinence" an Adequate Answer?*

The danger to health and life that is encouraged by the continued operation of our proscription on information and availability of contraceptives is not answered by shouting "abstinence". That answer was either not explained, heard or understood by the unwed mothers who bore

275,000 unwanted children in 1964[2] of which 50,000 were born to mothers in the 17 years of age or under group.[3] In 1965, the estimated number of ilegitimate births rose to 291,000, with over 40% being borne by unwed mothers in the 15-19 year age group.[4] Between 1940 and 1965, the estimated total of illegitimate births in the United States more than tripled, and "even if the illegitimacy rates remain constant at their 1965 levels, the number of illegitimate births would increase from an estimated 291,200 in 1965 to 403,000 by 1980.[5]

B. *Maternal Mortality*

In a study made of the five-year period from 1955 through 1959 in the New York City area, the death rate was approximately four times as great for the unmarried as for the married.

The puerperal death rate for the unmarried whites was nine times as great as for the married whites. The higher puerperal death rate was attributed to the much higher incidence of illegal abortions among the unmarried.[6]

C. *Infant Mortality*

The death rate for infants born out-of-wedlock was more than twice as high (48.2 per 1000 live births) as that for infants born in-wedlock (23.9 per 100 live births). Although fetal deaths were not included in this study, avail-

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[2] deRonge, Alberta: mimeograph. Connecticut Department of Health, State of Connecticut, Hartford, 1965, pp. 1, 12.

[3] Wallace, Helen M.: Am. J. Obst. & Gynec. 92:1125, 1965.

[4] Trends in Illegitimacy, U. S. Department of Health, Education and Welfare, Public Health Service, National Center for Health Statistics, Series 21, No. 15, p. 7.

[5] Id. pp. 8, 10.

[6] American Journal of Public Health, Vol. 51, No. 6, p. 851.

able data on a sample basis, indicated a significantly higher rate of late fetal deaths among the unmarried.[7]

D. *Health Characteristics*

Illegitimate children are not only stigmatized socially by their legal status, but they also suffer handicaps with respect to the physical development at birth and their subsequent health. This has been demonstrated by studies conducted in New York City and can be shown in two health related characteristics that the reported uniformly on the birth certificates in all states: the birth weight of the child and the attendant at the birth and place of delivery.[8]

E. *The Cost to the Community in Dollars*

Even the computerized era that we live in cannot accurately calculate the dollar cost resulting from unwanted pregnancies. The outer limits of the problem is suggested, however, by a Kansas City study projected over a twenty-year period that estimated that progeny resulting from 100 unmarried pregnant adolescents would amount to ten million dollars.[9]

These fantastic figures were more recently supported in a study made jointly by the Yale University School of Medicine and the Yale-New Haven Medical Center, who followed 100 unwed patients, age 17 or less, who were delivered of their first child at the Yale-New Haven Medical Center between January 1, 1959 and December 30, 1960: "Our 100 girls have had 340 babies in only five years. The

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[7] Ibid, p. 857.

[8] Trends in Illegitimacy, (1940-1965), supra, p. 17.

[9] The Adolescent Unwed Mother, Jeffries, J. E. Editor: Ross Roundtable on Maternal and Child Nursing, Columbus 1965, Ross Laboratories.

average girl in this group still has over twenty years of potential reproductivity remaining.'"[10]

F. *The Unwanted Child*

We have dealt up to now mostly witht he impact of the statutes upon the parents. But the children produced by virtue of the Massachusetts statutes must be considered too. The plight of the unwanted child, and its social consequences, have been well stated by Dr. Karl Menninger:

> "Far more important than the dramatic examples in which the hostility of a mother ruins the life of an unwanted child, are the more general effects of repressed maternal hatred. Where one child reacts to this with an acute mental illness, dozens of children react to it in more subtle ways by developing self-protective barriers against the inner perception of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them. The rage of the southern poor white against the Negro suspected of some dereliction is referable to the hate he feels inwardly at having been himself, like the Negro, unwanted. The same is perhaps true in the case of Germans and Jews and in many other situations which give opportunity for the expression of hatred in the denial of the feeling of being rejected. The importance

[10] The Young Unwed Primipara, Am. J. Obst. and Gynec., Vol. 95, No. 5, p. 727 (1966).

of this factor in the psychology of war is even greater, in my opinion, than the economic factor arising from the increase in population. This is why I say that from the purely scientific point of view, planned parenthood is an essential element in any program for increased mental health and for human peace and happiness. *The unwanted child becomes the undesirable citizen, the willing cannonfodder for wars of hate and prejudice. . .*" [11] (Emphasis supplied)

G. *Will the Availability of Contraceptives be Effective in Diminishing These Evils?*

Both the Kansas City Study [12] and the scholarly work conducted by Yale University and the Yale-New Haven Medical Center [13] conclusively demontrate the marked degree of recidivism amongst unwed mothers. It can reasonably be inferred that undesirable effects resulting from primary transgressions of the moral code will diminish with the availability of contraceptives and the concomittant education and instruction in use.

"The critical role that contraception can play in rehabilitation of the unwed mother is stressed." [14]

H. *How Compelling is the Need for this Legislation?*

(1): We have previously conceded the desirability of legislative enactments designed to enhance morals. To that

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[11] *Love Against Hate* (1942, p. 224). See also Coghill, *Emotional Maladjustments from Unplanned Parenthood*, 68 Virginia Medical Monthly 682 (1941). Jenkins *The Significance of Material Rejection of Pregnancy for the Future Development of the Child*, in Rosen *Therapeutic Abortion* (1954), p. 269.

[12] See Footnote No. 8.

[13] See Footnote No. 9.

[14] See Footnote No. 9.

end, we accept, for this day, any direct statutory proscription on enumerated sexual behaviors.

Is it the public policy of the Commonwealth, however, to permit the ills of unwanted pregnancies to spread unchecked *among those who indulge in illicit sexual intercourse?* In *Commonwealth* v. *Corbett*,[15] 307 Mass. 7, the Court declared that ". . .it does not appear to be any part of the public policy of the Commonwealth, as declared by the legislature, to permit venereal disease to spread unchecked *even among those who indulge in illicit sexual intercourse*. . ." (Emphasis supplied)

". . .The social gain from the deterrence achieved is not worth the tragedy of unwanted pregnancy or venereal disease in the cases in which the statute fails in the purpose; and to prescribe such pregnancy or disease as punishment in illicit intercouse would be a monstrous thing. I cannot attribute that scheme of values to the legislature." *Weintraub, C.J., State* v. *Baird*, 50 N.J. 376, 37- (1967).

In *Corbett, supra*, the Court recognized that people either inadvertently or intentionally become wayward. The Court wisely refused to turn its head from harsh realities and, notwithstanding the moral consideration inherent in how venereal disease was contracted, articulated public policy in the absence of legislative fiat. It is true that the Court found it unnecessary to invalidate the law to correct the evil, and only had to reason that the forbidden article was sold to prevent disease and not "for the prevention of conception" to accomplish an obviously desirable result.

If this Court was now seeking a similar cure, this appellee would have to be content, for example, with a reversal of his conviction on a factual basis that his exhibition and distribution was not "for the prevention of contraception," but instead was "for the purpose of testing the law." Such

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[15] For additional discussion on *Corbett* case, See Argument No. II.

an obviously patent artifice, however, is not seriously suggested; the Court should have little difficulty in observing the imbalance between legislative intent and individual and community harm.

In addition, we prefer to believe that our legislature is not so unfeeling as to disagree that the punishment of an unwanted pregnancy is a monstrous thing—and must conclude that it did not take into account the foregoing ills when enacting and amending the statutes here in question.

(2) It would appear that preventing conception, per se, is not immoral — at least in a legal, as distinguished from a religious sense.[16] The most conservative prevailing religious view is expressed in the recent Vatican Encyclical, *Humanae Vitae,* but, even the staunchest advocate would be hard pressed to suggest that pronouncement by the Holy Father has received universal or even widespread acceptance by Roman Catholics.

One may more than just muse over whether there remains any substantial moral issue involved in the prevention of conception — and wonder if it isn't the moralists (in their point of view), rather than morality, who most stand to lose. "Moralists (Legislatures) may have to pronounce upon these questions, but woe to the world if, when they are consulted, they cannot agree among themselves."[17] Is there that kind of majority opinion regarding these statutes to justify their continuance? Does a moral system that is soundly and firmly based on the golden rule, need to be affected if we abolish these laws? Cannot we articulate an acceptable moral code and rephrase the laws to prevent sprinkling contraceptives throughout the schoolyard, without closing our eyes to the wretched effects of un-

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[16] *Griswold*, supra.

[17] Canon Tiberghian.

wanted pregnancies? Any moral taboo which operates to preserve an outdated concept of what is obscene or what is necessary or desirable to prevent promiscuity, merely to pacify or sooth deeply ingrained prejudices, can only operate to hurt the community it purports to protest. Any attempt to endorse such taboo with authority of the Deity does not change the facts and does little to cover them up.

The problem of defining morals and prescribing or proscribing conduct that will enhance them is probably an endless one. That fact only highlights the necessity for this Court to closely scrutinize any legislation which cannot quickly be demontrated as a reasonable means to accomplish that end sought by our lawmakers.

To all of this, the Commonwealth must argue that in some way the statutes do more good than harm and that all the recited ills can be avoided by the simple expedient of abstinence. But, is the answer really that simple? We can go back to Adam and note the lost battle by the first man in forebearing the forbidden fruit.

For the knowledgable and informed who premeditatedly break the moral code, the failure to have readily available a contraceptive device can be frighteningly severe; for the uneducated[18] or poverty stricken[19] married, the

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[18] Although Section 21A provides limited availability to married persons, it specifically discourages education of use and availability: "This section shall not be construed as affecting the provisions of Sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or contraception; . . ."

[19] Many contraceptives, e.g., intra-uterine devices, diaphragms, oral contraceptives, require medical consultation and prescription. Section 21A's requirement, however, that married persons make a trip to their physician to obtain a condom or prescription for foam makes about as much sense as requiring a trip to the doctor's office to purchase toothpaste or aspirin tablets.

penalty for failing to abstain is pitifully unnecessary; for the wayward, ignorant or mislead Eve, the penalties are tragic; for the unwanted child the penalties can be cruel; for the unwitting, non-participating community, any penalty is mis-applied and points out the incongruity in suggesting that community welfare is served by the challenged statutes.

Any or all of these penalties can only be avoided at the price of abstinence. That price imposes an intolerable choice (or chance) which the Commonwealth has no power to demand.

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In addition to an M.D., Section 21A permits only ". . . A registered pharmacist actually engaged in the business of pharmacy . . ." to furnish a contraceptive to a married person.

These apparently unnecessary stringent requirements suggest questions that may be pertinent to whether Section 21A is reasonable regulation conforming to the mandate of *Griswold*. Has experience indicated that doctors and pharmacists, prior to the enactment of Section 21A, have been judicious in prescribing and selling contraceptives solely "for the prevention of venereal disease" and thereby are entitled to an entrusted status in the keeping of morals Are the doctors and pharmacists expected to keep records of prescriptions that will be helpful to future legislation, or will in some way provide for a check on our moral health? Since "everything costs more in a drug store" (common knowledge) was the statute designed as a covert way of discouraging use in order to soothe the feelings of the moralist? Do the requirements manifest the interest of the purveyors of contraceptives, as suggested by Weinraub, C.J. in *State* v. *Baird*, 50 N.J. 376 (1967) in footnote 1., p. 381.

> "I cannot forget what I believed was the situation when I was concerned with this problem as a member of the Bar. I believed then that the opposition to the vending machine sale was stimulated by manufacturers of condoms whose outlet was the drugstore. The condom was always obtainable; the difference was that the drugstore price was 300 percent of the vending machine figure. The dispute was over price and profit."

At any rate the legislature does seem bent on making matters much more difficult for the married to honestly enjoy their cherished rights than for the unmarried to suffer the penalties for their waywardness. The married must go to a doctor and get a prescription; the unmarried can go in and, with the most undetectable of lies assert his purchase is solely "for the prevention of venereal disease." Does this not fairly lead one to question the "wisdom" of the legislature.

II. THE MASSACHUSETTS BIRTH CONTROL STATUTE (G.L. c. 272, s. 21) DENIES THE DEFENDANT THE RIGHT TO LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN THAT IT IS ARBITRARY AND CAPRICIOUS, AND HAS NO REASONABLE RELATION TO A PROPER LEGISLATIVE PURPOSE.

A. *The Standard of Due Process to Be Applied.*

In *Griswold* v. *State of Connecticut*, 381 U.S. 479, the United States Supreme Court reaffirmed the requirements of the due process clause expressed in *Myer* v. *Nebraska*, 262, U.S. 390 (1923) as follows:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (Pp. 399-400)

Although *Griswold* concerned itself with the "use" of contraceptives within the hallowed privacy of the marital relationship, the majority opinion made clear its intention to repudiate unreasonable state legislation which concerned itself with zones of privacy created by fundamental constitutional guarantees.

> "Such a law cannot stand in the light of the familiar principle, so often applied by this court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly

and thereby invade the area of protected freedom'. *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 307." *Griswold* v. *State of Connecticut*, *supra*.

The fundamental rights involved, in the instant case, are those of an individual to give and receive advice and articles concerning harmless methods and approved means for preventing the undesirable legal, social, economic, psychological, and other far-reaching and attendant effects resulting from an unwanted pregnancy or children.

In *Meyer* v. *Nebraska*, *supra*, the court was concerned with legislation touching upon a right of a fundamental, individual and personal character, essential to maintaining the independence, integrity and private development of a citizen in a highly organized, yet democratic, society. The concern of the court, however, has not been limited to application of due process standards solely to rights that are individual and personal in character. In a long line of cases the courts have been fit to review both Federal and State legislation that concerned itself solely with economic regulation. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Berman* v. *Parker*, 348 U.S. 26 (1954); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

In *Nebbia* v. *New York*, 291 U.S. 502 (1934) the court restated the requirements of the due process clause, although upholding the validity of a statute regulating a commercial enterprise:

"If the laws passed are seen to have a *reasonable* relation to a proper legislative purpose, and are neither aribtrary nor discriminatory, the requirements of due process are satisfied, . . . ." (p. 537) (emphasis supplied)

The Massachusetts court has seen fit to reject legislation having to do with economic regulations that are shown to be arbitrary and capricious. In *Coffee-Rich, Inc.* v. *Commissioner of Public Health*, 348 Mass. 414 (1965) the court stated as follows:

> "It seems to us that the defendant's reasons for attempting to prohibit the sale of Coffee-Rich are more fanciful than real. . . . there is nothing in the record to suggest that such deception by common victualers or institutional users prevails or even exists in Massachusetts 'legislative regulations must be reasonable in their nature, directed to the prevention of real evils and adapted to the accomplishment of their avowed purpose. Under the guise of protecting the general welfare there cannot be arbitrary interference with business or irrational or unnecessary restriction' *Opinion of the Justices*, 247 Mass. 589, 595-596, 143 N.E. 808; *Sperry & Hutchinson Co.* v. *Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 425, 30 N.E. 2d 269."

Although it would appear the courts have been prone to permit legislators a large degree of judgment with regard to economic regulation, they have at the same time subjected to much more intensive scrutiny, under due process, legislation which impairs the freedom of the individual to live a fruitful life or to exercise his own judgment as a citizen rather than as a subject. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), *Slochower* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

The statute involved in the instant case plainly falls within the latter category. We are not herein concerned

with the restriction of a commercial activity, even though, as illustrated above, that type of regulation can be subject to scrutiny by this court. What is involved, is this appellee's right to disseminate information and to distribute a safe and medically approved article[20] to those members of the community who seek to exercise their own judgment on a subject matter that clearly concerns them privately and neither affects detrimentally the general welfare of the community (other than in a manner supportive of the Commonwealth's position) nor is reasonably related to a valid legislative purpose.

There is nothing in the record of this case that can lead to the inference that the appellee's actions were detrimental to the public's health, welfare or morals.

> "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." *Meyer* v. *Nebraska,* supra (p. 401)

The standards imposed on State Legislatures by the due process clause may be summed up therefore as (1) having a reasonable relationship (2) to a proper legislative purpose (3) and not otherwise arbitrary or capricious.

### B. *Objectives of the Massachusetts Birth Control Statutes*

In order to apply the standard of due process, it is first necessary to determine what objectives were sought to be achieved by the legislature. In doing this, we will briefly

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[20] Condoms, vaginal foam, etc., are considered non-prescriptive articles. See "Modern Methods of Birth Control", Appendix, 46-48.

review decisions of that court that have previously dealt with the propriety of this legislation.

> "The Provisions of General Laws (Ter. Ed.) c. 272, S. 21, first appeared in St. 1879 c. 159, in substantially the same words as are now used. That was the earliest enactment in this Commonwealth respecting the prevention of conception, in framing legislation under the police power. The legislature, without any denial of rights under either the State or the Federal Constitution, might take the view that the use of contraceptives would not only promote sexual imorality but would expose the Commonwealth to other grave dangers . . ." *Commonwealth* v. *Gardner*, 300 Mass. 372 (1938).

Although all of the Massachusetts cases have consistently taken the view that this legislation is designed to improve the public morals and prevent "sexual immorality", the defendant is otherwise at a loss to even begin to understand what "other grave dangers", in the words of the *Gardner* case, can be reasonably apparent in this enlightened day and age. With all due respect for the necessity to engender and encourage "morality", in accordance with whatever definition of morality one might want to propose, it is difficult to see that our birth control statutes validly accomplish that end.

Speaking of the instant statute in 1917, the Court said:

> "Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women . . ." *Commonwealth* v. *Allison*, 227 Mass. 57.

Although such a noble purpose must always be respected, any proponent of this legislation must find himself hard-pressed to substantiate a reasonable relationship between the operation of the statute and its purported aim. In *State of New Jersey v. William R. Baird,* 50 N.J. 376 (1967), Weintraub, C.J., in a concurring opinion stated:

> "We, however, have no statute making contraception illegal, unless the statute now before us is read to say so by implication, and no one wants to go that far. No other statute says a party guilty of illegal intercourse is guilty of a further offense because he or she avoided pregnancy. And if it suggested the legislature meant to impede illicit intercourse rather than to illegalize conception as such, I could not accept that view of the legislative intent. That thesis would assume the legislature intended pregnancy (and venereal disease as to such contraceptives as also to protect against it) to serve either as a resraint upon illicit affairs or as punishment for them. In my view, the social gain from the deterrence achieved is not worth the tragedy of unwanted pregnancy or venereal disease in the cases in which the statute fails in the purpose; and to prescribe such pregnancy or disease as punishment in illicit intercourse would be a monstrous thing. I cannot attribute that scheme of values to the legislature." *Id.*

It would appear that this court, in its prior decisions, has approved of that "scheme of values", at least insofar as there is merit to the contention, suggested by the defendant, that illicit affairs are increasingly resulting in the tragedy of unwanted births.[21] It is suggested, however, that

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[21] See Argument No. 1.

in the light of present day data and contemporary scientific and social thinking that this court should find merit in taking another look at that which it has previously condoned.

The court took a peek at previously approved values, in 1940, when it decided *Commonwealth* v. *Corbett*, 307 Mass. 7.

Recognizing that the continued blanket prohibition of the use of contraceptives was resulting in serious harm to the community, the court saw fit to close its eyes, to to speak, to the noble purpose it enunciated in *Commonwealth* v. *Allison, supra,* and reversed in *Corbett,* the conviction of one found guilty who sold a contraceptive "for prevention of disease." With what today must be regarded, in the light of the ready availability of contraceptives, as tongue in cheek, the court said in *Corbett, supra,* "it is clear that the public policy of the Commonwealth, as declared by the legislature, is offended by the sale of articles intended to prevent conception. Recognizing some change in the legislative scheme of values the Court concluded in *Corbett,* ". . . it does not appear to be any part of the public policy of the Commonwealth, as declared by the legislature, to permit venereal disease to spread unchecked *even among those who indulge in illicit sexual intercourse.* It is now recognized that venereal disease cannot be confined to the guilty, but may afflict innocent wives, or husbands, innocent children in whom it is congenital, and innocent victims of contact with diseased persons or the germs of disease apart from sexual intercourse. Statutes show that the policy of the Commonwealth is to endeavor to check the spread of venereal disease . . ." (emphasis supplied).

The Appellee submits that in 1968 science has come a long way in checking the occurrence and spread of venereal disease. The larger problems today, as will hereinafter be discussed, are the social and economic results of unwanted

pregnancies and births. The importance of the *Corbett* decision to the position taken by this defendant is that even though *Corbett's* conviction was reversed, upon the narrow view that he was not selling "for the prevention of conception," the court recognized that there are limitations to blanket proscriptions of behavior that are based upon the standards of morality.

When legislation is designed to promote health, safety, or the general welfare in a material sense, its validity under the due process clause can be tested by considerations that can be objectively determined and rationally weighed. Whether a statute is arbitrary or capricious, or has a reasonable relation to a proper legislative purpose, turns in such cases upon factual material which can be discovered and presented to the court in a fashion exemplified by a Brandeis brief.

When legislation is designed to promote public morality, however, the problem of applying the standards of due process must necessarily take a different form. Moral purposes are more easily understandable in the direct prohibition of fornication, adultery and other statutes where the sexual act is of direct consideration. In this case, however, the legislature has sought to legislate purely on the basis of moral principles, enumerated in the *Gardner* and *Allison* cases, not subject to objective evaluation. In such a case how are the standards of due process to be applied?

Certainly the court cannot take the position that the simple claim of a moral aim by the proponent of the legislation satisfies the requirements of due process and requires that this defendant be suffered with the burden of showing little or no connection between the statute and its avowed purpose. In *Poe* v. *Ullman*, 367 U.S. 545, , Mr. Justice Harlan said, "the mere assertion that the action of a state finds justification in the controversial realms of morals cannot justify alone any and every restriction it imposes." *Id.* at 551. Any such doctrine would immunize virtually all

legislation from the mandate of the due process clause. It would allow the legislature to impose restraint upon individual liberties solely on the ground that some fraction of the community regarded the issue as a moral one. If we followed this kind of thinking, it could well be argued that the mini-skirt is responsible for a greater amount of immorality than the availability of contraceptive articles.

We submit that the constitutional standard for applying due process in cases where the legislature seeks to promote public morals requires that the *specific* moral practice, e.g. exhibiting or distributing contraceptives, regulated by the statute must be objectively related to the public welfare. We shall illustrate the converse of such relationship in Sections C through G., Infra. In the event no such relationship can be demonstrated, the regulation must at least conform to the predominant view of morality prevailing in the community (the proscription of fornication, adultery, etc.). In other words, if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot enforce the morals of a minority group in the community, upon other of its members.

The doctrine we urge here is fully supported by the obscenity cases. In *Roth* v. *U. S.*, a majority of the court held that the material alleged to be obscene could not be restricted unless it met the standard that "*to the average person, applying contemporary community standards,* the dominant theme appealed to prurient interest." 354 U.S. 476, 489 (1957). This standard was more recently confirmed in *John Cleland's Memoirs of a Woman of Pleasure* v. *Attorney General of the Commonwealth of Massachusetts,* 383 U.S. 413 (1966).

We submit that this Court should not recognize as a contemporary community standard that one who commits an illegal act of intercourse should be forced to do so without the use of contraceptive. To support that view by making

reference to the apparent "wisdom" of the legislature, is to merely beg the question. If a Court was willing to take judicial notice in 1940 of the widespread ill effects of permitting venereal disease to spread unchecked, it should have no difficulty today in declaring the undesirability of permitting the widespread ill effects of unwanted pregnancies and births.

In *Commonwealth* v. *Gardner*, supra, the Massachusetts Court advanced the view that the use of contraceptives "would promote sexual immorality." In the *Corbett* case, that Court recognized that the evil of venereal disease permitted the sale of contraceptives but "solely for that purpose." Accordingly, it would appear that this defendant, or any other person, could appear before a group of seventeen hundred students at Boston University, display or exhibit contraceptive devices, distribute them at will and tell them with tongue prominently displayed in cheek that they are to be used solely for the prevention of venereal disease. We condone the prevention of one illness and prohibit even speaking about far greater matters of public welfare and concern. If is that kind of hypocrisy that goes far toward encouraging youth to pay little attention to the teachings of their elders.

It would appear that at a time when honesty, instead of hypocrisy, would provide the most effective means of communicating with the youth of today,[22] that the operation of this statute and its continued approval by the courts would go far towards demolishing that desirable means of communication.

We ask this court to take notice of the fact that any adult, or adult-appearing youngster can walk into every drugstore in the Commonwealth of Massachusetts and pur-

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[22] We submit that today's young adults are far more responsible than alarmists would have us believe. (Hippies and Yippies notwithstanding).

chase a condom without being asked if it is to be used solely for the prevention of disease. It is farcical to say that the druggist is protected from violating this statute because it somewhere appears on the container that the condom is to be used solely for the prevention of disease. We ask this Court to note the wide variety of respectable women's publications that advise the sale throughout the country of Emko and other vaginal foams that have as their sole utilitarian purpose the prevention of conception and the fact that any male or female adult or one who appears to be an adult can walk into most drugstores or supermarkets in the Commonwealth and purchase said vaginal foam without prescription.

That this practice, illegal though it be, is in conformity with the contemporary community standards is witnessed by the fact that the defendant has been unable to discover any prosecution arising out of the sale or distribution of vaginal foam and no prosecution in at least the last twenty years for the sale or distribution of the condom.[23]

In the regard now under consideration the remarks of Justice White in *Griswold* v. *State of Connecticut, supra,* appear to be particularly appropriate. Although that case concerned itself with the use of contraceptives within the

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[23] On September 6, 1968 the Boston Municipal Court refused to issue complaints in the following cases: Application for Complaint No. 5469 charging that John M. Finlayson, an employee of Raymonds Dept. Store in Boston, exhibited Emco foam on September 5, 1968; on Application for Complaint No. 5470 that one Herbert Simmons, an employee of "Big L Health and Beauty Aid Store" at 366 Washington Street, Boston on September 5, 1968 did sell a container of Emko vaginal foam and on Application for Complaint No. 5471 that an employee of Jordan Marsh Co. on September 5, 1968 did offer for sale a magazine, to wit: "Mademoiselle", containing an advertisement for Emko vaginal foam. On all three Applications a hearing was held before the Chief Justice of the Boston Municipal Court, Adlow, J. Although the hearing was not reported, all of the Applications for Complaint were denied even though witnesses were heard who established the facts of exhibition, sale and advertising.

marital relationship, Justice White's remarks are equally appropriate in opposing the view that the use of contraceptives promotes sexual immorality.

> ". . . Indeed, after over eighty years of the state's anti-use proscription, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This 'undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis' . . . .
>
> "In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the state's policy against such relationships. *It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any form of administrative consideration.* Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. . . . At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, *or ineffectiveness* as the broad anti-use statute under attack in this case. . . ." (emphasis supplied) (pp. 506, 507)

C. *An objective of the statutes to restrict sexual intercourse to the propagation of children would not be a proper legislative purpose.*

Neither the legislature of the Commonwealth of Massachusetts nor the Massachusetts court, in reviewing the pertinent statutes, has ever explicitly stated that an objective of the birth control statutes has been to restrict sexual intercourse to the propagation of children. The idea, however, may be implicit in the statement of that court to the effect that "their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus engender in the state and nation a virile and virtuous race of men and women. *Commonwealth* v. *Allison, supra,* and otherwise may be implicit in the "other grave dangers" that the court indicated the legislature may have considered in proscribing the use of contraceptives. *Commonwealth* v. *Gardner, supra.*

If it be an objective of the law to restrict sexual intercourse to procreation, either by the blanket proscription of contraceptives to the unmarried, or the narrow and unreasonable restriction of contraceptives under §21A to those who are married, then we submit this is not a proper legislative purpose under the requirements of the due process clause.

Such a legislative purpose would contravene the approval to use contraceptives contained in Section 21A and thus be in violation of what has been recognized since 1966, even in the Commonwealth of Massachusetts as an invasion of individual privacy that is not property within the police power of the state to either promote morals or general welfare.

In addition, such legislative approach would be incongruous in view of the undisputed fact that it is the wayward who is most likely to procreate through the proscription of contraceptives.[24]

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[24] See Argument Nos. 1, supra.

In any event, this Court should not accept such a drastic view of the law without a much more clear-cut statement from the legislature that the statutes were designed to accomplish this end.

D. *Extrinsic Aids to Avoid Conception are not Objectively Related to the General Welfare.*

It is the virtually unanimous opinion of all branches of the medical profession that the use of extrinsic articles of contraception are not harmful to the individual either on physical or psychological grounds. The widespread use of such devices by physicians is in itself sufficient evidence of this opinion.[25]

In *Griswold* v. *State of Connecticut, supra,* although the Court was considering actions that were approved by a licensed physician and professor at the Yale Medical School, that fact never appeared to be material to the question in issue. Although the qualifications of the defendant herein have not been made a part of the record, this Court might nonetheless be receptive to inferences which can reasonably dispel any notion that he is a Charlatan.

Since the enactment of G.L. C. 272, S. 21A, a hurried attempt to comply with the *Griswold* case, contraceptive devices, albeit with exceptions, are legally prescribed and used in all states of the Union. The appellee can well understand the necessity for expertise in instructions on use for some contraceptive articles, e.g., intra-uterine, diaphragm, or related devices, but points out that the distribution of articles in the instant case consisted only of those that are unanimously considered to be non-prescriptive in nature and that the Massachusetts Statutes fail to acknowledge the fact that condoms and foams do not require the approval of a medical expert. Moreover, it can-

[25] Guttmacher, *Conception Control and the Medical Profession*, 12 Human Fertility 1, 2-3 (1947).

not be argued, other than in a tenuous concept of morality, that the use of a contraceptive itself results in any injury.

### E. *The Prohibition Against Using Extrinsic Aids to Avoid Conception Does Not Conform to the Predominant View of Morality Within the Community.*

Whatever the predominant community sentiment may have been in the latter half of the 19th century when these statutes were enacted, there can be no doubt that *Griswold* v. *State of Connecticut*, supra, has recognized that marital privacy cannot be interfered with by legislative views regarding the use of contraceptives.

It is not necessary to condone immorality in order to recognize that the predominant, prevalent present day thinking is opposed to the damning, devastating and tragic consequences[26] that result from the proscription of contraceptives to the wayward. The most recent poll of the American Institute of Public Opinion (The Gallup Poll), published on September 1, 1968, reveals that among the Catholic community questioned, 76% of them felt that birth control information should be available to anyone who wants it. Only 17% were opposed, and 8% had no opinion.[27] Among the Protestant members of the community, 75% of those questioned felt that birth control should be available to anyone who wants it. Only 19% were opposed and 6% had no opinion.[28]

#### 1. *The opinion of the medical community.*

The very general prescription of contraceptive devices in medical practice has already been pointed out. It is

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[26] See Argument No. 1, infra.
[27] Boston Sunday Globe, September 1, 1968. Also see Appendix,
[28] Ibid.

hardly likely that such an overwhelming proportion of a profession, so highly regarded by the public, would advise or employ methods considered morally reprehensible by the prevailing opinion of the community.

In the joint study by the Yale University School of Medicine and the Yale-New Haven Medical Center cited in Argument No. 1, *infra*, the doctors in charge of the study concluded:

> "The critical role that contraception can play in rehabilitation of the unwed mother is stressed." (p. 724)

2. *The attitude of the religious community.*

a. *Protestant.* Among Protestant groups opinion is almost unanimous that the use of extrinsic aids to avoid conception is morally justified in at least the privacy of the marital relationship. Indeed some groups hold that proper limitation of families, by medically approved methods, may be considered a religious obligation. We cite only a brief sampling of this opinion:

The Lambeth Conference of Bishops of the Anglican Communion, representing 40,000,000 communicants including members of the Protestant Episcopal Church in the United States, adopted the following resolution in 1958:

> "The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that the planning, in such ways as are mutually acceptable to husband and wife in Christian family life and should be the result of positive choice before God."[29]

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[29] The Lambeth Conference, 1968, S.P.C.K. (1958) p. 1:57.

The General Assembly of the United Presbyterian Church, in 1959, made a similar declaration:

> "The 17th General Assembly
>
> "Approves the principle of voluntary family planning and responsible parenthood,
>
> "Affirms that the proper use of medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family,
>
> "Urges the repeal of laws prohibiting the availability of contraceptives and information about them for use within the marriage relationship . . ."[30]

The Council for Christian Social Action, United Church of Christ, comprising the Congregational Christian Church and the Evangelical and Reformed Church, in 1960 stated its position as follows:

> "Responsible family planning is today a clear and moral duty. We believe that public law and public institutions should sanction the distribution through authorized channels of reliable information and contraceptive devices. Laws which forbid doctors, social workers and ministers to provide such information and service are infringements of the rights of free citizens and should be removed from the statute books. Any hospital which receives public funds should permit doctors to provide all services they consider necessary."[31]

And the National Council of Church of Christ in the United States of America issued the following statement:

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[30] Quoted from Planned Parenthood News, Spring, 1959.
[31] 26 Social Action, No. 8 (April 1960), pp. 24-7.

"Most of the Protestant churches hold contraception and periodic continence to be morally right when the motives are right. They believe that couples are free to use the gifts of science for conscientious family limitation, provided the means are mutually acceptable, non-injurious to health, and appropriate to the degree of effectiveness required in the specific situation."[32]

In Connecticut, the Connecticut Conference of Congregational Churches at its 95th annual meeting in October, 1962, adopted a resolution approving " 'The principle of voluntary family planning' and backed 'proper use of medically approved contraceptives that may contribute to the spiritual, emotional and economic welfare of the family.' "[33]

The Connecticut Council of Churches in December 1962 took like action. Its resolution said: "Christian marriage is a relationship of love and fidelity . . . [and] the sexual life within this relationship is given by God for the benefit of his children, and is neither an ethically neutral aspect of human existence, nor needs to be justified by the procreation of children."

b. *Jewish.* The position of the Reformed Jews is stated in a resolution passed by the 45th General Assembly of the Union of American Hebrew Congregations in 1959:

"a. We favor the elimination of all restrictions and prohibitions against the dissemination of birth control information and the rendering of birth control information and the rendering of birth control assistance by qualified physicians, clinics, and hospitals.

"b. We favor the wider dissemination of birth control information and medical assistance, both by pri-

[32] N.Y. Times, Feb. 24, 1961.
[33] New Haven Journal Courier, Oct. 11, 1962.

vate groups such as the Planned Parenthood Association, and health agencies of local, state, and the federal government as a vital service to be rendered in the field of public health."[34]

A similar view is taken by Conservative Jews, speaking through the Rabbinical Assembly:

> "Proper education in contraception and birth control will not destroy, but rather enhance, the spiritual values inherent in the family and will make for the advancement of human happiness and welfare."[35]

A minority Jewish group — the Rabbinical Alliance of America, representing Orthodox Jews — takes an intermediate position, approving the use of extrinsic aids to prevent conception under more limited circumstances:

> "The Rabbinical Alliance feels itself impelled to clarify the viewpoint of Orthodox Judaism on birth control practices, which we feel has been erroneously represented. Orthodox Judaism does not condone any artificial birth control measures by the male spouse, under any circumstances. Only in cases where the health of the female is jeopardized are certain birth control measures allowed and then only through direct consultation between the medical and rabbinic authorities."[36]

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[34] *Resolutions Passed by the 45th General Assembly, Union of American Hebrew Congregations* (1959), reprinted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

[35] Quoted in Planned Parenthood Federation, *The Churches Speak Up On Birth Control* (1960).

[36] N.Y. Times, Aug. 12, 1958.

c. *Catholic.* The Catholic position is that the use of extrinsic aids to prevent conception is morally wrong.[37] There is serious doubt, however, that the majority of Catholics are willing to accept the Encyclical as representing their own private view of morality.

F. *The position of federal, state and local government.*

For many years the Federal Government has acted in a manner wholly inconsistent with any premise that the use of extrinsic aids to avoid conception is morally objectionable. Thus contraceptives have long been made available to members of the armed forces.[38] During World War II the War Production Board, whose function it was to allocate scarce commodities, promulgated regulations providing sufficient materials for the manufacture of contraceptives for men and women at 100 percent of the 1940-1941 production level.[39] Federally sponsored hospitals, available to personnel of the armed forces, provide contraceptive advice and care.[40] Recently the Department of Health, Education and Welfare announced that "Information on the prevention of pregnancy similar to that provided in the normal course of a doctor-patient relationship may be provided Indian beneficiaries of the Public Health Service."[41] In May of 1963 Federal funds were provided by Congress for a program of full birth control service in the District of

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[37] Vatican Encyclical on Birth Control, *Humanae Vitae*, Aug. 1968.

[38] See, e.g., Freedman, Whelpton and Campbell, *Family Planning, Sterility, and Population Growth* (1959), p. 177.

[39] War Production Board, Supplementary Order No. M-15-b, List C, issued January 24, 1942.

[40] See, e.g., letter in Army Times, Nov. 15, 1961.

[41] H.E.W., Public Health Service, Division of Indian Health, Circular No. 6 S-2, dated Jan. 21, 1963. See also H.E.W., A Survey of Research on Reproduction Related to Birth and Population Control, Public Health Service Publication No. 1066 (1963).

Columbia, available to all mothers delivered of a child at the District of Columbia General Hospital and to women qualifying for welfare assistance.[42] And in January of 1964 the Office of Economic Opportunity made a grant of funds to Corpus Christi, Texas, earmarked to provide birth control information and mobile birth control clinics.[43]

The pattern in state and local government is the same. The prescription and use of contraceptive devices, at least under some circumstances, is now lawful in all fifty of the states. More significant is the issue here, in many states and localities the government operates positive programs to make contraceptive devices available for persons desiring to use them.

Many local governments follow the same practice. In addition to Corpus Christi (supra), in New York City, under a Federal Grant (p. 58) totalling $1,462,718, five clinics operated for the city by cooperating hospitals have provided birth control advice and materials since October 1, 1964.[44] Health authorities in Dallas County, Texas, conduct free birth control clinics and send mobile units to dispense advice and contraceptives throughout the county.[45] In Dade County, Florida, the Public Health Department furnishes free contraceptive pills to welfare recipients.[46] The city authorities of Pasadena, California, distribute birth control information and supplies in low-income sections.[47]

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[42] Washington Post, Mar. 18, 1964; District of Columbia Government, Department of Public Health, Birth Control Program: Policies and Procedures Manual (May 1, 1964). In the first months of the program well over 1200 women received such care.

[43] N.Y. Times, Jan. 6, 1964. The Times reports that at least two other cities—Milwaukee and Washington—are seeking similar grants.

[44] N.Y. Times, Jan. 7, 1965. Two of the hospitals are Catholic and limit their techniques to the rhythm method. Other clinics are planned. Each clinic can handle about 1000 cases a year. *Ibid.*

[45] Edinburgh Valley Review, July 17, 1963.

[46] Miami, Florida Herald, Aug. 24, 1963.

[47] Washington Post, Mar. 10, 1963.

G. *Other manifestations of community opinion.*

It is hardly necessary to accumulate further data on this point. The following facts may, however, be noted:

The White House Conference on Children and Youth in 1960 adopted the following resolution:

> "We recommend that planning for the size of families is desirable in order to relieve the deprivation of children. Thus, facilities and programs on a local public or private basis should be available to married couples to provide medical advice and services for child spacing. These should be consistent with the creed and mores of the families served."[48]

The American Assembly, at its meeting in Harriman, New York, in 1963 recommended:

> "Assumption of responsibility by the federal, state and local governments for making available information concerning the regulation of fertility and providing services to needy mothers compatible with the religious and ethical beliefs of the individual recipients."[49]

In August 1964 the Republican Citizens Committee made public its Critical Issues Paper No. 12, recommending, inter alia:

> "That the United States Public Health Service provide appropriate leadership and assistance to state and local health departments in offering help to disadvantaged citizens in the regulation of birth by

[48] N.Y. Times, Jan. 24, 1960.
[49] N.Y. Times, May 6, 1963.

means which accord with their religious beliefs and individual preferences."[50]

The 1964 Convention of the Young Women's Christian Association adopted a resolution recommending support for the development of:

> "appropriate channels for the widest possible sharing of knowledge so that individuals and governments are enabled to obtain family planning information of such variety as to serve those of different creeds, mores and in different circumstances."[51]

Some 222 Planned Parenthood Federation birth control clinics are operating throughout the country.[52]

Our two living former Presidents — President Truman and President Eisenhower — served as Co-Chairman of the Honorary Sponsors Council of the Planned Parenthood Federation's 1965 Nationwide Campaign.[53]

H. *The Statutes are Irrational in Operation.*

The Massachusetts statutes operate in an irrational manner in at least four important respects:

(1) The statutes, so far as enforced, will always be applicable to married persons and seldom applicable to unmarried persons engaging in sexual relations. This paradox arises from the fact that

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[50] Critical Issues Council, *Resources and the Future Population* (Aug. 1964), p. 5.

[51] Adopted at 23rd National Convention, Cleveland, Ohio, Apr. 24, 1964 (mimeo release).

[52] For a listing of affiliates, see Planned Parenthood Federation, *Planned Parenthood Affiliates* (June, 1964).

[53] Planned Parenthood News, Fall, 1964, p. 1.

it is not unlawful for persons to use otherwise forbidden devices for the purposes of preventing disease although by so doing they also prevent conception.

(2) The statutes operate to discriminate against low income and uneducated groups of our citizens. The permission granted to married couples in § 21A does little to alleviate this problem and, in fact, can be considered to increase it. Section 21A in its proscription of advertising does little to enhance the dissemination of knowledge regarding contraceptive articles to those who most need it. The requirement in § 21A that even married persons must obtain a doctor's prescription and can purchase the otherwise prohibited article only from a pharmacist militates against availability to the poor. The application of the statute is therefore wholly arbitrary.

(3) Since the statutes are not generally enforced or enforceable, they can only be applied to individuals in an arbitrary fashion. No rational program for enforcement has been instituted or could be. The law is thus subject to the unfettered discretion of the prosecuting officials. It is open to use for the harassment of an unpopular citizen. It is not capable of rational administration. See *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), Aff'd. 336 U.S. 933 (1949); *Goldstein, Police Description Not To Invoke The Criminal Process;* Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543 (1960).

(4) The statutes tend to produce an increase in the number of illegal abortions. While the evidence is not conclusive, there are many authorities who find a direct relation between the availability of

contraceptive services and the criminal abortion rate.[54] It stands to reason that the Massachusetts statutes, which cut off all public information and services on contraception, operate to accentuate this acute social problem. The law thus promotes the very kind of immorality it ostensibly is designed to limit.

I. *The Problem of Overpopulation.*

Population expansion poses a momentous problem for this country and the world today. The issue must be ranked as equal in importance to the questions of disarmament and peace, automation, poverty and civil rights.[55] Indeed population control is a part, and a significant part, of each of these burning problems.

We will not attempt to present in this brief the facts pertaining to the "population explosion." It is now fully apparent that the public welfare of the world, this nation, and all its constituent parts, requires immediate consideration of measures to plan and limit population growth. And any such program must obviously rely upon the use of scientific methods for preventing conception.

The Federal Government has recognized the problem and is actively seeking a solution. In December of 1962 United States policy was officially stated by Richard H.

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[54] See, e.g., Kleegman, *Planned Parenthood: Its Influence on Public Health and Family Welfare*, in Rosen, *Therapeutic Abortion* (1954), pp. 254-5; Calderone, *Abortion in the United States* (1958), pp. 111-3, 182; Whelpton, *The Abortion Problem*, in Williams, *The Sanctity of Life and the Criminal Law* (1957), p. 211.

[55] Note the statement of the National Academy of Sciences: "Other than the search for lasting peace, no problem is more urgent." *The Growth of World Population*, Publication No. 1091 of the National Academy of Sciences, National Research Council (Wash., D. C., 1963), p. 2.

Gardner, Deputy Assistant Secretary of State for International Organization Affairs, speaking to the United Nations:

> "In the opinion of my Government progress toward [the] high aims of the United Nations Charter cannot be measured merely by increases in gross national product. The object of economic development is the welfare and dignity of the individual human beings.
>
> "If the condition of the individual, and not gross statistics, is to be the measure of our progress, then it is absolutely essential that we be concerned with population trends. .... So long as we are concerned with the quality of life we have no choice but to be concerned with the quantity of life.
>
> "We believe these statements are true not just for some but for all nations. . . . .
>
> "Within the United States our local, state and federal governments are all devoting attention to population trends as part of their planning for the improvement of individual welfare."[56]

President Kennedy supported these developments. Thus in a speech on June 5, 1963, calling for solution of the problem of hunger in the world, he made clear the interest of this country when he said, "Population increases have become a matter of serious concern."[57]

And President Johnson, in a significant and much noted passage in his State of the Union Address in 1964, emphasized that additional action was necessary and would be taken:

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[56] U. S. State Department Bulletin, Vol. XLVIII, No. 1228, Jan. 7, 1963.

[57] N.Y. Times, June 5, 1963.

> "I will seek new ways to use our knowledge to help deal with the explosion in world population and the growing scarcity of world resources."[58]

We submit the evidence is overwhelming that, at least as of 1971, the use of extrinsic aids, per se, to avoid conception, cannot be held contrary to the prevailing morality of the community. The acceptance of such practices by general public opinion, by virtually the entire medical profession, by the bulk of religious groups, by respected organizations and individuals, and especially the encouragement to utilize such devices on a widespread scale by all levels of government itself — render any other conclusion impossible.

We are confronted then with an acute world-wide problem that is pressing for immediate solution. That solution must involve, as a major element, the voluntary use of contraceptive devices to limit the number of children born. Viewed in this context, in the light of world opinion and world needs, the contrary judgment of the Massachusetts statutes, left-overs from a by-gone era, can have little standing.

## Conclusion

Some may feel, as the Commonwealth has suggested, that the problems recited herein are not as acute as suggested or that our legislative process is the sole and proper machinery for effective relief. Such complacency and ready answer in unjustified.

The legislative process has not only failed to respond, but has capriciously and arbitrarily ignored what empirical evidence indicates the problems of the community

[58] 111 Cong. Rec. 27 (daily ed., Jan. 4, 1965).

to be. People are dying — the unwanted child (in many cases uncared for), is running amuck in the ghetto — and the cost to the community is staggering.

These statements are, of course, headlines with which we seek to emphasize the defendant's point of view. We do not intend to over-simplify the complex factors that are involved, but these are the facts to buttress our point of view. If this Court accepts them, there should be no reluctance to conclude that judicial disapproval and forthwith denouement is required to remove that which violates due process of law.

For all other reasons stated the Appellee respectfully urges that the Judgment of the Court of Appeals declaring the Massachusetts anti contraception law unconstitutional by affirmed in all respects.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

No. 70-17

THOMAS S. EISENSTADT

v.

WILLIAM R. BAIRD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

## BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

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IN THE

# Supreme Court of the United States

No. 70-17

THOMAS S. EISENSTADT

v.

WILLIAM R. BAIRD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

## BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

## INTEREST OF HUMAN RIGHTS FOR WOMEN, INC.

Human Rights for Women, Inc., is a non-profit tax exempt organization, incorporated in the District of Columbia in December, 1968. Its purposes are to provide volunteer legal assistance in litigation involving the rights of women under the law, to undertake research on issues of discrimination against women, and to provide for educational projects on the conditions of women.

Human Rights for Women has devoted its efforts to furnishing legal counsel to women in cases involving sex discrimination in employment. HRW has also argued for the right of all women to terminate unwanted pregnancies. Unwanted or untimely childbearing is strongly linked to employment discrimination in that employers continue to use childbirth as an excuse for not hiring women. The fact that Title VII of the 1964 Civil Rights Act was intended to prohibit such discrimination does not prevent it from occuring.

Human Rights for Women seeks to place *all* women, married or single, on an equal footing with men, not only with respect to job opportunities, but in all aspects of their lives.

We disagree with Appellant that there does not exist a right of single persons to sexual relations without unwanted pregnancy (Brief, p. 16), and we believe that denial of this right works a particular hardship on single women. It is a commonly understood principle assumed by social scientists of wide ranging backgrounds that the expression of one's sexuality is fundamentally linked to the development of one's personality, and to the general mental, emotional, and physical well-being of the individual.[1] Thwarting such expression causes deep psychic disturbance and inability to adjust to the ordinary problems of living. Women suffer emotional disturbance on a much larger scale than men.[2] We maintain that one reason for this is the continued existence of the Double Standard in sexual matters, with its attendant suppression of female sexuality, as sanctioned by laws such as the one herein challenged.

We are not advocating "free love." We are simply saying that the law should not restrict what is a matter of individ-

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[1] 6 Harvard Civil Rights Civil Liberties L. R. No. 2, "A Little Dearer than his Horse"—Legal Stereotypes and the Feminine Personality, pp. 271-283, p. 263 n. 26, and Maslow, A. H., "Self-Esteem and Sexuality in Women," Journal of Social Psychology, 1942, Vol. 16.

[2] P. Chesler, "Psychotherapy and Women," paper presented to the annual convention of the American Psychological Association (1970).

ual and very personal choice in light of the person's own moral, ethical, religious, or esthetic values.

> "There is a sacred realm of privacy for every man . . . where he makes his choices and decisions, fashions his character and directs his desires, a realm of his own essential rights and liberties, including, in the providence of God, liberty to go to the devil, into which the law, generally speaking, must not intrude." Archbishop of Canterbury, quoted in Chesser, *Live and Let Live* 58 (1958).

In accordance with Rule 42(2) of the Rules of this Court, the Special Assistant Attorney General of the Commonwealth of Massachusetts and attorneys for Appellee have given written consent to the filing of an *amicus curiae* brief by Human Rights for Women, Inc.

## QUESTIONS PRESENTED

1. Does Appellee have standing?

2. Is Massachusetts G. L. c. 272, § 21 unconstitutional on its face?

## STATEMENT OF THE CASE

In April, 1967, Appellee was arrested, charged, and convicted of violating Mass. G.L. c. 272, § 21[3] following a lecture on birth control at Boston University where he allegedly handed a container of contraceptive foam to an

[3]Chapter 272, § 21 reads: "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not

unmarried adult woman. On review, the Massachusetts Supreme Judicial Court invalidated that portion of the statute which prohibited "exhibiting" a contraceptive device, on First Amendment grounds, but upheld the portion prohibiting "delivery" of such a device. Baird's petition for a writ of habeas corpus was dismissed by the United States District Court for the District of Massachusetts. On appeal to the United States Court of Appeals for the First Circuit, the court held the statute unconstitutional on its face as being arbitrary and grossly discriminatory and having no legitimate legislative purpose. *Baird v. Eisenstadt*, 429 F.2d 1398 (1970). This is an appeal under 28 U.S.C. § 1254(2) by the State of Massachusetts from the decision of the Court of Appeals, First Circuit.

## ARGUMENT

### I. APPELLEE HAS STANDING TO ASSERT HIS RIGHTS AND THE RIGHTS OF SINGLE WOMEN.

a. The statute prohibits the dispensing of contraceptives by *anyone* to a single person. Appellee would be guilty under the same statute even if he were a physician.

b. Appellee occupies a role in relation to single women that is analogous to doctor and patient, *Griswold v. Connecticut*, 381 U.S. 479 (1965), to the NAACP and its members, *NAACP v. Alabama*, 357 U.S. 449 (1958), and to a Caucasion selling his property to a non-Caucasion in violation of a racially restrictive convenant, *Barrows v. Jackson*,

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more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Following this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), holding unconstitutional a Connecticut statute that forbade married persons from using contraceptives, the Massachusetts legislature enacted a law specifically allowing contraceptive devices for married people. Mass. G.L. c. 272, § 21A.

346 U.S. 249 (1953). Appellee has spent the greater part of his adult life fighting for the right of single people to birth control. He has held himself out to be, and is accepted as, the representative of single people in this issue. For this reason there is a logical nexus between Appellee's status and the claim of single people he seeks to adjudicate. And the rights of the latter are likely to be diluted or adversely affected if not considered in a suit involving one who represents them in this way.

## II. THE STATUTE VIOLATES THE RIGHT OF PRIVACY GUARANTEED BY THE NINTH AMENDMENT.

This Court has never held that the Bill of Rights protects only those rights that the Constitution specifically mentions by name. Other rights are recognized by this Court as emanating from the Bill of Rights: the right to be free from segregated public education, *Bolling v. Sharpe*, 347 U.S. 497 (1954); the right to travel, *Kent v. Dullus*, 357 U.S. 116 (1958); the right of military personnel to vote where they establish residency, *Corrington v. Rash*, 380 U.S. 89 (1965); the right not to produce membership lists, *NAACP v. Alabama*, 360 U.S. 240 (1959); the right to teach one's children German, *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right to educate one's children in private schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right to privacy in matters pertaining to marriage, family and sex, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to engage in sexual intercouse without unwanted pregnancy free from governmental intrusion, has been stated by a three-judge federal court in *Roe v. Wade*, 314 F.Supp. 1217 (N.D. Tex. 1970).

We agree further with the decision in *Roe* which, in holding the Texas abortion law unconstitutional, stated that the statute deprived "single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children," and pointed out

> The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of the individual. *Id.*, at 1221.

Restrictions on birth control are even more an invasion of privacy than restrictions on abortion. As this Court stated in *Griswold*, "Would we allow the police to search the sacred princincts of marital bedrooms for telltale signs of the use of contraceptives?". Certainly, the bedroom of a single woman should be at least as private and free of state interference. Indeed, a bedroom (birth control) is entitled to an even greater degree of privacy than the doctor's office (abortion).

While the Massachusetts legislature should be commended for its concern in safe-guarding the morals and chastity of the single people of that state, such concern is not compelling enough to adversely affect the right of single women to sexual relations free of unwanted pregnancy.

## III. THE STATUTE VIOLATES FUNDAMENTAL RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The statute challenged herein controls the lives of single women as effectively as if there were steel bars around them. Forcing a single woman to expose herself to the risk of unwanted pregnancy as *payment* for fundamental rights is so harsh a price as to effectively deny those rights.

There is nothing more demanding upon the body of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later. The possession and control of her body is effectively taken from her, in contradiction to the right of every person to give his time energy and skill only if he so chooses and for adequate compensation. This right was recognized in the last century:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

a. The statute denies single women the equal protection of the law in that

(1) It discriminates against them in favor of married women. The statute penalizes single women who assert state sanctioned rights granted married women. Although society favors marriage, *a woman should not have to marry in order to exercise fundamental human rights.*[4]

(2) It discriminates against them in favor of single men. Although the stattue is also intended to prevent single men from access to contraceptives, the effect on them is about as meaningful as a law denying them maternity leave. That is, the effect on single men is nil, while the effect on single women is drastic. A mere accident of biology—the fact that women have a uterus and men do not—is used to diminish single women's fundamental freedoms under the law. Men do not risk pregnancy with the non-use of contraceptives, and the unwed father is simply not comparable to the unwed mother in terms of social stigma, disruption of life plans, and the risk to life and health that accompany pregnancy.

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[4]The right to birth control regardless of marital status has been affirmed by the Planned Parenthood Federation of America, the United Nations International Conference on Human Rights (Proclamation of Tehran, May, 1968), by the Citizens Advisory Council on the Status of Women (56 A.B.A.J. 41, Jan. 1970), and the Department of Health, Education and Welfare *requires* that federally-supported state programs providing contraceptive services do so without regard to marital status (Social & Rehabilitation Service program regulation 50-1, 34 F.R. 1241, 1242, Jan. 25, 1969).

b. The statute denies single women due process of law in that it arbitrarily invades the privacy of their lives with no reasonably related benefit to health, safety, morals, or the general welfare, or any other compelling state interest. In fact, it serves no valid public purpose at all. On the contrary:

(1) The statute does not deter non-marital sexual relations.

> It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity. *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970).[5]

(2) The statute aggravates the desperate demand for illegal abortion.

(3) The statute causes "shot-gun" weddings, which studies show have a much higher rate of dissolution than other marriages.

(4) The statute creates unwanted children, who not only suffer a large share of that insideous crime known as "child-abuse,"[6] but also a higher rate of juvenile delinquency,

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[5]The 1955 American Law Institute Model Penal Code recommended exclusion from criminal prosecution "all sexual practices not involving force, adult corruption of minors, or public offences." § 207.5 The authors said that it was inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational, and other influences.

[6]Steel and Pollack, "Psychiatric Study of Parents Who Abuse Infants and Small Children," *The Battered Child*, University of Chicago Press (1968) p. 103.

failure in school, drug addiction, and mental illness, than do wanted children.[7]

(5) The statute causes untimely termination of education or loss of job, which frequently obligate society to assume support for the woman and child.

(6) Single women are denied, under the statute, the best medical care available under currently accepted medical standards.

c. The statute violates Appellee's due process rights because it serves no public purpose. Public Law 91-662, approved January 8, 1971, eliminated the Federal prohibitions (formerly contained in 18 U.S.C. 552, 1461, 1462 and 19 U.S.C. 1305(a)) against mailing or importing articles for preventing conception, except for unsolicited articles. Thus contraceptive foam, such as the foam involved in this case, can be ordered by single women in Massachusetts from other states by mail.[8] The Massachusetts statute now really serves only to harass people such as the Appellee.

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[7]Hans Forssman and Inga Thuwe, "One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused," Acta Psychiatrica Scandinavica, Vol 42 (1966). About half of all women seeking abortion are single women.

[8]Contraceptives could be obtained by single people from any place except Wisconsin, the only other state beside Massachusetts restricting the use of contraceptives by single people. *West's Wis. Stats. Annot.* § 151.15(4), renumbered § 450.11(4) by *1969 Laws*, ch. 336, § 106.

## CONCLUSION

The judgment of the Court of Appeals for the First Circuit declaring Mass. G.L. c. 272, § 21 unconstitutional should be affirmed.

Respectfully submitted,

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Human Rights for Women, Inc. and its counsel wish to acknowledge the assistance of Margot Champagne, a student at Hastings College of the Law, University of California, in the preparation of this brief.

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-17

GARRETT H. BYRNE,
APPELLANT,

*v.*

P.B.I.C., INC., NATOMA PRODUCTIONS, INC., FRANK BUTLER, MARJORIE DUNAWAY, JORY RICHARDSON, BROOKE LAPPIN, MORTON L. LEAVY, DONALD FRANCIS TIRABASSI, and MARLENA LANGSTON,
APPELLEES.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

## MOTION TO AFFIRM

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APPELLEES.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

## MOTION TO AFFIRM

Plaintiffs-appellees[1] move to affirm the judgment on the ground that it is manifest that the questions on which the

[1] The parties are referred to by their designations in the court below.

cause depends are so unsubstantial as not to need further argument.

## Statement of the Case.

On February 22, 1970, live theatre performances of *Hair* opened for an indefinite run in Boston. *Hair* is a rock musical which deals with the life style of many young people and their attitudes on such issues as the Vietnam war, racism, sex, drugs and pollution. At the time of its Boston opening, *Hair* was currently playing in at least five cities in the United States and fourteen cities throughout the world. It has been described by Clive Barnes of the New York Times as the most important musical that had appeared since "Oklahoma" in 1944.[2] However, defendant, the district attorney for Suffolk County, threatened multiple criminal prosecutions against plaintiffs, the producers and cast of *Hair*, if the play were produced in Boston.

Defendant does not assert that *Hair or any scene therein* is obscene. Specifically disclaiming any such contention, defendant asserts that certain scenes allegedly violated the Massachusetts statutory prohibition against "open and gross lewdness" (G.L. c. 272, §16) and the "closely similar"[3] common law offense of "indecent exposure." On May 6, 1970, a divided three-judge federal district court, in an opinion by Judge Coffin, found that since these offenses did not require proof of *any* of the elements of obscenity, they were unconstitutional; and, after making detailed and specific findings that plaintiffs would suffer irreparable injury, the court enjoined the threatened criminal prosecutions. *P.B.I.C.* v. *Byrne*, 313 F. Supp. 757.

The district court acted only after the state supreme

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[2] Tr. p. 49 of hearings in supreme judicial court of Massachusetts, which hearings were, by stipulation, treated as evidence properly before the district court. See footnote 5, *infra*.

[3] *Commonwealth* v. *Broadland*, 315 Mass. 20, 22.

court had refused plaintiff's prior efforts to determine whether these Massachusetts criminal offenses had — or constitutionally could have — any application to a concededly non-obscene live theatre performance. *P.B.I.C. v. District Attorney of Suffolk County*, Mass. Adv. Sh. (1970) 566.[4] In response to defendant's explicit threats of criminal prosecutions, plaintiff had originally filed suit in the state supreme court seeking a declaration that section 16 was inapplicable to live theatre productions and, if applicable, was unconstitutional; plaintiffs also sought an injunction restraining the threatened prosecutions. However, on April 9, 1970, the state court, in a terse rescript opinion, while recognizing the substantial nature of the substantive federal claims raised, refused without discussion to give declaratory relief, and as a matter of its "discretionary equitable jurisdiction, infrequently exercised" granted limited injunctive relief — *without deciding the merits of the federal claims* — only if plaintiffs made certain excisions.

Plaintiffs refused to avail themselves of an injunction on the terms offered. They believed that to do so would compromise "the integrity of the production" (313 F. Supp. at 761). Rather than face the risks involved in multiple prosecutions, plaintiffs immediately closed the play and commenced an action in the United States District Court seeking declaratory and injunctive relief. In the district court, all the judges recognized that the state court had not decided the merits of plaintiffs' federal claims, and defendant does not assert the contrary in his jurisdictional statement. The district court held an evidentiary hearing,[5] and on May 6 entered a permanent injunction against the threatened prosecutions.

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[4] Reprinted as an appendix to the opinion of the district court. (313 F. Supp. at 768; J.S. pp. 39-40)

[5] The evidence before the district court consisted of certain live testimony, numerous stipulations and, by agreement, a copy of the transcript of the testimony before the state supreme court.

Defendant then appealed directly to this Court under 28 U.S.C. §1253. *Byrne* v. *P.B.I.C.*, No. 484, Oct. Term 1970. On January 11, 1971, plaintiffs' counsel advised this Court that *Hair* had ceased its public performances in Boston, but that defendant apparently still intended to prosecute. On March 29, 1971 this Court vacated the judgment and remanded the case to the district court "to consider the question of mootness" (401 U.S. 987). The district court held an evidentiary hearing on May 5, 1971. After finding that the defendant intended to prosecute, the court unanimously concluded that the case was not moot and reinstated its injunction. (J.S. 59) This appeal followed.

Additional facts are stated where necessary to the argument.

## Questions Presented.

1. Are G.L. c. 272, §16's prohibition against "open and gross lewdness"[6] and the "closely similar" common law offense of "indecent exposure"[7] unconstitutional in the context of a theatre performance absent a showing that neither the play as a whole nor any scene therein is obscene?

2. Did the district court abuse its discretion granting declaratory and/or injunctive relief against defendant's threatened criminal prosecutions?

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[6] Mass. Gen. Laws Ann. ch. 272 § 16, provides:

> "A man and woman who, not being married to each other, lewdly and lasciviously associate and cohabit together, or a man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than three hundred dollars.

[7] The judges below recognized that the common law offense is so "closely similar" *Commonwealth* v. *Broadland*, 215 Mass. 20, 22) to the statutory offense that it requires no separate consideration. (313 F. Supp. at 764 n.10; id. at 768 n.1).

## Argument

POINT I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 16, AND THE COMMON LAW OFFENSES WERE UNCONSTITUTIONAL IN THE CONTEXT OF CONCEDEDLY NON-OBSCENE LIVE THEATRE PERFORMANCES.

### A. *In Failing To Require Any Element of Obscenity, The Massachusetts Offenses Are Unconstitutionally Overbroad.*

There is no contention that *Hair or any scene therein* could be characterized as "obscene" no matter how that term is defined. The threatened prosecutions here are for "open and gross lewdness" and the "closely similar" offense of "indecent exposure". *At every stage in this litigation defendant has argued that no obscenity criteria need be satisfied* in such prosecutions. The district court rightly rejected this contention.

The district court recognized that since earliest times live theatre has been an important medium for the exchange of ideas. As such, it is entitled to the protection of the first amendment (*Shacht* v. *United States*, 398 U.S. 58, 61,) and, as elsewhere, what falls short of obscenity is constitutionally protected (313 F. Supp. at 763-64). In so holding, the district court fully recognized that each medium presents its own set of problems so that any definition of obscenity must "take account of the differences inherent in [the various] media." (Id. at 763)[8] But the offenses here at issue were unconstitutionally overbroad because

[8] Wide screen, larger-than-life movie productions may be entitled to *less* constitutional protection than live theatre performances of the same subject where such magnification is absent and where, as the district court recognized (*Id.* at 764), "pose, lighting, angle of audience vision, mobility and dramatic context" are particularly important.

they purported to *dispense entirely with any obscenity criteria*, however defined.

The district court's decision was in accord with the decision of every court which has considered the problem. We know of no decision, and defendant cites none, in which a standard which entirely dispenses with obscenity — however defined to take account of differences in the various media — has been held constitutionally sufficient. This is clearly the case with respect to motion pictures. See the discussion in *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682-90 (and note 15); see also cases cited by the district court (313 F. Supp. at 763 n.9). And the same rule has — without exception— been applied to live theatre. *LaRue* v. *California*, 326 F. Supp. 348, 354 (D. Cal. 1971) (three judge court); *Barrows* v. *Municipal Court*, 1 Cal. 3d 821 (1970); *People* v. *Bercowitz*, 308 N.Y.S. 2d 1 (1970); *Adams Newark Theatre Co.* v. *Newark*, 22 N.J. 472 (1954), aff'd 354 U.S. 931. In *Barrows* v. *Municipal Court, supra*, the California Supreme Court emphasized that "any more restrictive rule could annihilate in a stroke much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." (*Id.* at 831).

These decisions dealing with the live theatre — *none of which is even mentioned by defendant* — are plainly correct. Certainly, if motion theatre productions are constitutionally entitled to the protection of obscenity standards — as every court in the country assumes — no sufficiently principled justification can be advanced for holding these standards wholly inapplicable to a live theatre performance of the same matter. Recognition that media differences may justify somewhat different conceptions of obscenity provides no warrant for holding obscenity criteria entirely inapplicable to live theatre. Nor can any sufficient distinction between the two media be grounded on any over-simplified distinction between "speech" and "con-

duct." Every aspect of speech involves some integrally related conduct, which has necessarily been treated as a part of that speech. Thus the conduct of distributing leaflets is protected by the first amendment. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419. Similarly, picketing and demonstrations, while they involve speech "plus," are both entitled to considerable protection under the first amendment. *Amalgamated Food Employees Union* v. *Logan*, 391 U.S. 308; *Gregory* v. *Chicago*, 394 U.S. 111; and *Brown* v. *Louisiana*, 383 U.S. 131. In essence this is because it has always been understood that some conduct is an integral part of the speech itself, and the communication cannot exist without it. This is particularly true of live theatre — a medium of expression older than recorded history itself. In the theatre, there is an inseparable union of words and action, which together have served as a vehicle for conveying ideas. This union has never been understood to be "mainly conduct and little speech." *Cohen* v. *California*, 403 U.S. 15, 27 (dissenting opinion). To the contrary; it has always had "a recognizable communicative aspect [which is] beyond dispute". *Cowgill* v. *California*, 396 U.S. 371 (memorandum of Harlan, J.). Accordingly, the non-speech aspects of the theatre (if any) can be regulated only upon a showing of "a sufficiently important governmental interest" (*United States* v. *O'Brien*, 391 U.S. 367, 376) which, in this context, requires a showing of obscenity.

Since the Massachusuetts offenses here at issue do not require any showing of obscenity, however defined, either with respect to the play as a whole *or any scene therein*, the district court rightly held that they could not constitutionally be applied to a live theatre production. And in this respect we note, as did the district court (313 F. Supp. at 764-65), that neither movies nor live theatre is to be meas-

ured by the standards which obtain in the city streets. As the *Barrows* court said:

> "'Acts which are unlawful in a different context, circumstances, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.'" (Id. at 830)

Accordingly, it is a minimum constitutional requirement that the sexual activity complained of be patently offensive when measured by contemporary standards *for what is acceptable in the theatre. Manual Enterprises* v. *Day*, 370 U.S. 478, 487-88. (Harlan, J.).[9]

### B. *The Massachusetts Offenses Are Impermissibly Vague In A First Amendment Context.*

Even if some standard other than obscenity were permissible, "indecent exposure" and "open and gross lewdness" are far too imprecise to be applied where first amendment interests are at stake. As the district court recognized, "precision of regulation must be the touchstone"[10] where the first amendment interests are involved. The district court then analyzed the Massachusetts decision construing section 16 and "indecent exposure" and, pointing to their history and purpose, indicated that they were not capable of acceptable application to theatre plays. (313 F. Supp. at 764-765).

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[9] This is not a case of nudity occurring in public places as was *Nelson* v. *Iowa*, — Iowa —, 178 N.W. 2d 448, cert. den. 401 U.S. 923, relied upon by defendant. Here the nudity had dramatic relevance to a live threatre performance. There is, therefore, no room for the argument that nudity alone is sufficient to render the first amendment inapplicable. E.g., Harlan J., *Manuel Enterprises* v. *Day*, *supra*, at 490; *Jacobellis* v. *Ohio*, 378 U.S. 184; *Cain* v. *Kentucky*, 397 U.S. 319; *Bloss* v. *Dykeman*, 398 U.S. 278.

[10] *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682.

The Massachusetts offenses are designed to prohibit certain sexual acts that are conducted in an open and offensive manner — to prohibit conduct which fairly can be characterized as involving "indecent exposure". In *Commonwealth* v. *Broadland*, 315 Mass. 20, 22, the court recognized that section 16 is "at least closely similar to the common law offense of indecent exposure", and it cited with approval its earlier decision in *Commonwealth* v. *Wardell*, 128 Mass. 52, 53, which discussed the elements of the common law offense:

> "The conduct of the defendant is thus intentionally, indecently, and offensively exposing himself in the house of another to two girls of tender years, *without necessity or reasonable excuse, and in such a way as to produce alarm* [the older girl who saw the exposure fled in fright], proves that he was guilty of gross lewdness and lascivious behavior."

These offenses, therefore, proscribe sexual exposure for its own sake, exposure unrelated to anything else, exposure whose offensiveness to men of ordinary sensibilities needs no elaboration. *Commonwealth* v. *Dickinson*, 348 Mass. 767; *Commonwealth* v. *Broadland*, supra. As defendent concedes (J.S. p. 14), they reach only nudity which is both "offensive" and "without reasonable excuse". It defies reason, we submit, to lump concededly non-obscene live theatre performances with the exposure involved in *Wardell*, *Broadland* and *Dickinson*.

Moreover, as the district court observed, each performance of *Hair* involves a broad range of activities to which the defendant objects. There are, said the court, "a variety of conceivably lewd scenes in the play, some solemn, some bumptions, some open, some covert. To date, the District Attorney has identified seven acts which in his mind violate

the statute." (313 F. Supp. at 766) If such unstructured, open-ended offenses as "open and gross lewdness" or "indecent exposure" can be applied to live theatre performances, no actor or producer can determine in advance what parts of a stage play involving "simulated" sexual conduct would be held to constitute a criminal act. Here, for example, most of the scenes complained of not only do not involve nudity, but in the words of the state supreme court, they are simply "incidental stage action which a jury *could* conclude was intended to simulate sexual intercourse or deviation". (Emphasis supplied.) Not only is such "simulation" constitutionally protected, as the motion picture decisions in this Court demonstrate, to permit the application of these vague offenses to live theatre performances would in effect "license . . . the jury to create its own standard in each case *ex post facto.*" *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Coates* v. *Cincinnati*, 402 U.S. 611. And, of course, since first amendment interests are at stake, the vagueness requirements are very exacting so that freedom of expression is not the victim of loosely drawn prohibitions. *Interstate Circuit* v. *Dallas, supra; Coates* v. *Cincinnati, supra.* Neither section nor "indecent exposure" can reasonably be characterized as offenses which are "obviously susceptible of a limiting construction." *Zwickler* v. *Koota*, 389 U.S. 241, 249 n.7; *Coates* v. *Cincinnati, supra.* What is more, *here plaintiffs unsuccessfully sought a limiting construction in the state court.*[11] *Cf. Barrows* v. *Municipal Court, supra.*

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[11] Ignoring the fact that plaintiffs were unable to obtain one, the dissenting judge repeatedly states that section 16 might be given an acceptable narrowing construction. (313 F. Supp. at 768-69). Surely section 16 is not "obviously susceptible" to such a construction. The judge then spends the bulk of his opinion (313 F. Supp. at 768-72) discussing a point on which there is no disagreement, namely, that a "lewdness" statute might be constitutionally applied if it were construed to require all the elements of obscenity — a construction of section 16 which, it should be noted, has always been specifically rejected by the defendant. The judge then argues that "wholly unrelated" sexual activity occurring on stage might be con-

## Point II. The District Court Did Not Commit Error In Granting Declaratory and Injunctive Relief.

Given defendant's vigorous objection to federal intervention, it is important to focus on the exact nature of his argument. Defendant objects to the original injunction entered by the district court on May 16, 1970, asserting that the circumstances *at that time* were insufficient to support federal relief even assuming the substantive unconstitutionality of the Massachusetts offenses. Defendant makes no contention that, in any event, the reinstatement of the injunction after this Court's remand constituted error because of changed circumstances. That is a separate question and defendant has, of course, waived any objection that the posture of the case before the district court on May 6, 1971, had so changed that — whatever the propriety of the original action — a different result was now called for. Thus, defendant asks this Court to consider this case on the factual situation that existed when the district court entered its *original* order.[12] On that basis, we believe that the

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strued within the reach of section 16. (313 F. Supp. at 772-72). No one disagrees with that proposition as applied to a situation in which reasonable men would necessarily agree that the sexual aspects of the play had no rational connection to the play. It is very clear, however, that the dissenting judge intends something of a far different order — that the court substitute its judgment for that of the author on what is or is not "integral" to the play. (313 F. Supp. at 773-74). As the majority opinion recognized, if the protected character of a scene depended on a court's judgment as to dramatic relevance "the chilling effect on theatre generally would be of ice age proportions" (313 F. Supp. at 765). Moreover, as the majority opinion also points out, the judge's construction of section 16 involves a complete rewriting of the statute. Finally, at no time has defendant contended that the application of section 16 turns in any manner on whether the judge views the sexual activity as an "integral" part of the play. So far as defendant is concerned, the fact of sexual activity is alone sufficient to trigger the application of section 16.

[12] If the circumstances existing on May 16, 1970 were not sufficient to warrant federal relief, defendant apparently believes that this shows that the order entered on May 6, 1971 cannot be supported.

district court was clearly correct. For the convenience of the Court, however, we discuss in an appendix the propriety of the action taken by the district court on remand.

A. *The Original Relief Granted By The District Court.*

1. *Injunctive Relief.*

In its original action, the district court granted both a declaration that the Massachusetts laws could not be constitutionally applied to live theatre performances, and an injunction restraining threatened criminal prosecutions. Defendant vigorously challenges the propriety of injunctive relief. The challenge was entirely without substance. Even if the standards subsequently set down in *Younger* v. *Harris*, 401 U.S. 37, are to be applied wholesale to suits for injunctions against threatened criminal prosecutions,[13] the orig-

[13] It has always been recognized that "special circumstances" were required to support federal equitable intervention against threatened state criminal prosecutions. *Cameron* v. *Johnson*, 390 U.S. 611, 618. *Dombrowski* v. *Pfister*, 380 U.S. 479, particularized that concept: where first amendment interests are at stake, bad faith or overbreath will justify federal injunctive relief if there is a showing of substantial "chilling effect" on speech. This doctrine was specially formulated to protect first amendment interests. Candor requires recognition that *Younger* v. *Harris*, 401 U.S. 37, may have modified *Dombrowski*. There is language in the opinion of the court by Mr. Justice Black which suggests that a "chilling effect" is, by itself, insufficient to support federal equitable relief — that, in addition, other unusual circumstances must be present (*Id.* at 47-54). It is not altogether clear that this language is confined to situations where prosecutions are already pending, although the opinion at the outset specifically purports to limit its discussion to this question. (*Id.* at 41).

In view of the foregoing, we have measured the propriety of federal injunctive relief by the standards set out in *Younger*, and we believe that the district court's injunction satisfied those criteria. We would add, however, to the extent that Mr. Justice Black's opinion is taken to be directed toward non-pending as well as pending criminal prosecutions, it may not represent the view of a majority of the Court. Mr. Justice Douglas expressly disavows it. (401 U.S. at 58 et seq.) And

inal injunction was clearly valid. After concluding that the Massachusetts offenses were facially overbroad (*Dombrowski* v. *Pfister*, 380 U.S. 479), the district court made *detailed findings* concerning irreparable injury (313 F. Supp. at 766-77). In these circumstances the district court's carefully supported conclusion that injunctive relief was necessary should be accepted absent a showing of abuse of discretion. *Dyson* v. *Stein*, 401 U.S. 200, 203; Rule 15(g) of the Rules of this Court. The jurisdictional statement does not remotely approach any such showing. To the contrary, as will be shown, defendant's jurisdictional statement makes no serious effort to challenge the factual findings on which the court rested its decision; rather it seeks to obscure their significance. The central fact is, as the district court concluded, that if an injunction were denied, plaintiffs would have suffered grave and irreversible injury. If federal relief was not appropriate on this record, it is difficult to conceive of a case in which that relief would be properly granted.

The district court's findings may be summarized as follows:

1. The district court emphasized that plaintiffs faced the danger of multiple prosecutions. As the court said — on the basis of defendant's explicit representations and of the wide variety of his objections,[14] "defendant feels duty

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Justices Brennan, White and Marshall do not accept Justice Black's view with respect to non-pending prosecutions, if indeed that be his view. See *Perez* v. *Ledesma*, 401 U.S. 82 at 117-130. And the opinion of Justices Stewart and Harlan is careful to leave open the question of the propriety of equitable relief where a criminal prosecution is not pending, 401 U.S. at 54-56. In any event, it is interesting to note that there is nothing in the language in *Samuels* v. *Mackell*, 401 U.S. 66, also an opinion by Justice Black, which even remotely suggests that declaratory as opposed to injunctive relief should not be awarded where, as here, there is no pending state prosecution, but the threat of one.

[14] The district court (313 F. Supp. at 766) noted that:

"each night's performance will offer the District Attorney new

bound to prosecute", and *"we cannot reasonably expect a single test case to settle the contours of the law"* (313 F. Supp. at 766; emphasis added) Compare *Younger* v. *Harris*, 401 U.S. 37, 48-49 (burden of "defense of a single prosecution" ordinarily does not warrant federal equitable relief against pending prosecution). *Byrne* v. *Karalexis*, 401 U.S. 216, 220 (semble). The district court reasoned that, in the circumstances before it, long standing decisions of this Court would have justified federal equitable intervention, wholly apart from *Dombrowski*. E.g., *Terrace* v. *Thompson*, 263 U.S. 197, 214-16; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500; *Beal* v. *Missouri Pac. R.R.*, 312 U.S. 45, 50-51. There decisions were fully approved in *Younger* v. *Harris*, 401 U.S. at 45-46, 49, 54.

In the jurisdictional statement, a somewhat strained effort is made to minimize the threat of multiple prosecutions. (J.S. pp. 10-11) Defendant asserts that there is no factual support for plaintiffs' charge of "harassment" (J.S. p. 10). But plaintiffs made no such charge. They alleged the threat of multiple prosecutions, not harassment. And on that point there can be no doubt. There is *no* representation in the jurisdictional statement that there would *not* have been multiple prosecutions. Indeed, the jurisdictional statement concedes that "prosecutions sufficient to bring about compliance with law [would] be undertaken (J.S. p. 10). In these circumstances, the jurisdictional statement alone establishes the existence of the *threat* of multiple prosecutions — and only a real threat, not the

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opportunity to carry out his declared intent. Moreover, there are a variety of conceivably lewd scenes in this play, some solemn, some bumptious, some open, some covert. To date, the District Attorney has identified seven acts which in his mind violate the statute. Acquittal for participation in one of these acts does not bar prosecution for different conduct in another scene. We may therefore expect multiple prosecutions against members of the cast." See *Byrne* v. *Karalexis*, 396 U.S. 976, 983 (1969) (Opinion of Stewart, J.).

actuality of multiple prosecutions need be established to warrant injunctive relief. In any event, the district court specifically found that "defendant feels duty bound to prosecute" (313 F. Supp. at 766), and it had no doubt that the defendant intended to close the play down unless his views are complied with. That court is, of course, "closer to the facts [and has] heard the merits fully argued.[15] Its findings with respect to the threat of multiple prosecutions cannot be set aside here on the basis of defendant's denial of any intent to harass.

ii. Of importance to the district court was the "additional factor" of the "chilling effect of the First Amendment right of plaintiffs, others engaged in the theatre in Massachusetts and the theatre going public in the New England area. The "chilling effect" of threatened prosecutions is, as Judge Coffin recognized, of a substantial magnitude when plays, rather than motion pictures, are involved.[16] Moreover, as the court also recognized, a live theatre production is a "wasting" asset. If the film "I Am Curious Yellow" is temporarily not permitted to show in Boston, it can, nonetheless, be transported elsewhere to a

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[15] Unreported opinion of Justice Jackson in *United States ex rel, Knauff* v. *McGrath*, Oct. Term 1949, printed in 96 Cong. Rec. A3750 at A3751. See also, *Breswick & Co.* v. *United States*, 75 S. Ct. 912.

[16] The district court observed that:

> "actors in 'Hair' must face either sentences of up to three years for sex offenses or, if the show closes, loss of their livelihood. Plaintiffs' dilemma cannot fail to influence other actors and producers, especially since theatre patrons may take offense from a variety of scenes, thus providing the prosecutor with a long shopping list. When faced with a prosecutor intent on extirpating lewdness in accordance with the mandate of the Supreme Judicial Court as he sees it, actors and producers will either avoid Boston altogether or will steer clear of the forbidden zone by excising constitutionally protected material in order to avoid the risk of a three year prison term. Either result is offensive to the First Amendment." (313 F. Supp. at 766-67).

waiting theatre; but the *Hair* cast, which was drawn almost entirely from the Boston community, obviously could not be moved with the same facility. Nor, of course, could the theatre itself immediately obtain a new play as could a movie theatre obtain a new movie. Finally, the uncertainty and delay in the attempt to reopen elsewhere necessarily does have a sharp and adverse effect on both the morale and artistic efforts of the cast.

To keep a theatre closed while substantial first amendment claims are being vindicated will therefore, have drastic consequences where first amendment interests are involved. Producers, actors and theatre owners will steer far wide of controversial plays. Delay and uncertainty alone have a substantial deterrent effect. *Dombrowski* v. *Pfister, supra;* Note, 83 Harv. L. Rev. 844, 853-58. Denial of injunctive relief will have particularly far-ranging effects; it will encourage those who recognize that first amendment interests can in many circumstances be destroyed simply by rendering their ultimate vindication too burdensome.

iii. The district court also made specific findings supporting its additional determination that "plaintiffs face a substantial financial loss even if they persist in the face of multiple prosecutions and prevail". (313 F. Supp. at 767). The relevant facts are undisputed and are quickly stated. "Hair" has had the largest advance sale in the history of Massachusetts legitimate theatre. At the time it was forced to close, "Hair" had played for five weeks to capacity audiences and had outstanding $600,000.00 worth of advance ticket sales. (Id. at 761) It was, as the district court said, scheduled "for an indefinite run." (Id. at 759) Absent injunctive relief, this situation would be completely reversed. On the basis of uncontradicted evidence before it, the district court found that

> "the production is losing *weekly* box office gross receipts of about $70,000, is making refunds of exchanges for tickets already sold, and is no longer making advance sales." (Id. at 761) (emphasis supplied.)

Defendant's response to these facts is most interesting. He says that the expurgated production may be as valuable as the unexpurgated one. (J.S., p. 11) But there is no expurgated production, and plaintiffs have refused to produce such a version — thereby surrendering their first amendment claims and those of the audience. Defendant also denies (J.S. p. 12) that a play is a wasting asset — a point already considered. Finally, defendants says that the monetary loss is not "paramount to the concept of federalism" (J.S. p. 12). That "concept" is, however, nowhere explained. Defendant's statement is simply rhetoric, not reasoning — and very unclear rhetoric at that. Surely defendant does not claim that the principles announced in *Younger* and *Samuels* (or in *Dombrowski*) are of constitutional dimension — wholly beyond change even by Congress! Defendant's rhetoric is, moreover, written in complete disregard of the history of federal equity practice in protecting federal constitutional rights against state abridgement. See cases cited in *Younger* v. *Harris*, 401 U.S. at 45-46; Brennan, J., concurring and dissenting in *Perez* v. *Ledesma*, 401 U.S. 82, 104-126. Defendant ignores the fact that our present federal structure presupposes that the federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution" (*Zwickler* v. *Koota*, 389 U.S. 241, 247), and this is particularly true where freedom of speech is at stake. Finally, the limitations of *Younger* were satisfied in this case even if they are held applicable to non-pending prosecutions.

2. *Declaratory Judgment.*

*Zwickler* v. *Koota,* 389 U.S. 241, makes plain that with respect to non-pending prosecutions (compare *Samuels* v. *Mackell,* 401 U.S. 66 on pending prosecutions), the propriety of declaratory relief must be assessed separately from the grant of equitable relief. We think that there is no serious question that the district court properly granted a declaratory judgment on the question of the facial overbreath of the Massachusetts offenses here in question. Surely, the need for original intervention by declaratory relief was appropriate, *particularly so where the state court had declined to act.*[17]

Nothing in *Samuels* v. *Mackell,* 401 U.S. 66, has any bearing on the propriety of declaratory relief. In that case, the Court was dealing with pending state criminal prosecutions and held that, ordinarily, declaratory relief should not be given where injunctive relief would be inappropriate under *Younger* v. *Harris,* 401 U.S. 37. But there was no suggestion that declaratory relief would be unavailable if no criminal proceeding were pending. Indeed to have so held would not only be inconsistent with one of the purposes of the declaratory judgment act (*Perez* v. *Ledesma,* 401 U.S. at 111 et seq. Brennan, J. concurring and dissenting) but would *sub silentio* overrule *Zwickler* v. *Koota, supra.*

To have denied declaratory and injunctive relief would have been a gross injustice to the first amendment rights of the viewing public. What is really at stake is the extent to which the "banned-in-Boston" syndrome is consistent with the guarantees of the first and fourteenth amendments to the constitution of the United States. For years "ban-

[17] Defendant's argument that the district court should have abstained (J.S. pp. 16-17) is nonsense. It wholly ignores the fact that plaintiffs had sought a narrowing construction from the state court but were unable to obtain one.

ned in Boston" has been a source of humor and amusement to many. It is, however, a deadly serious matter. Here it has operated to close down a play which has been described by the drama critic of *The Boston Globe* as "one of the best musicals [he had] ever seen" (Tr. 12), and by Clive Barnes of *The New York Times* as the most important musical in twenty-five years. (Tr. 49). Thousands of decent, upright people in Massachusetts wished to see the production of "Hair" as it is, not the production excised so as to satisfy this defendant. It is outrageous in the extreme to think that American citizens in New York, in Los Angeles, in Chicago, in San Francisco, in Seattle and in Las Vegas, not to mention citizens in virtually every major capital of the western world, as well as Tokyo, Sydney and Tel Aviv, could see this production, but the citizens in Massachusetts and other New England states may not. The district court correctly concluded that the constitution of the United States prohibited that result.

B. *The Present Posture Of The Case.*

Following the district court's ruling, defendant appealed directly to this Court under 28 U.S.C. §1253. On January 11, 1971, plaintiffs' counsel advised the Court that the play had closed, and on March 11, 1971, this Court remanded the case to the district court "to consider the question of mootness." *Byrne* v. *P.B.I.C.*, 401 U.S. 987. The district court held an evidentiary hearing at which defendant reiterated its intention to prosecute, whereupon the district court found that the case was not moot and reinstated its injunction. (J.S. p. 59) Defendant once again appealed.

In the technical sense, the only consideration with respect to mootness is whether the case retains its character as a "live controversy" (*Hall* v. *Beals*, 396 U.S. 45, 48; *Powell* v. *McCormack*, 395 U.S. 486, 495-500, 517-18) so as to con-

stitute a "case or controversy" within the meaning of article III. Given defendant's express intention to prosecute, there can be no serious argument that the case is moot (*Younger* v. *Harris*, 401 U.S. 37, 42)[18] and defendant does not urge the contrary. Nor does defendant urge that the fact that the play had closed has relevance here. It asks this Court to consider only the propriety of the injunctive and declaratory relief on the basis of the evidence before the district court on May 16, 1970. Defendant has, therefore, waived any objections which might otherwise be open to him because of the play's closing. Rule 15(c) of the Rules of this Court. We have, however, included an appendix discussion which demonstrates that, wholly apart from waiver, the district court's action was correct.

## Conclusion.

The motion to affirm should be granted, and the judgment affirmed.

Respectfully submitted,

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[18] See also *Sibron* v. *New York*, 392, U.S. 40, 50-58, and its progency, *Ginsberg* v. *New York*, 390 U.S. 629, 634 n.2; *Carafas* v. *LaValle*, 391 U.S. 234, 237-38; and *Benton* v. *Maryland*, 395 U.S. 784, 790-91. And see *Sanks* v. *Georgia*, 401 U.S. 144, 150-51. Compare *Golden* v. *Zwickler*, 394 U.S. 103 (case moot where no threat of prosecution and statute had no impact on plaintiffs' primary conduct); *Boyle* v. *Landry*, 401 U.S. 77 (no basis for discretionary declaratory relief where no threat of criminal prosecution).

## APPENDIX A

On being advised that the play had closed, this Court remanded the case to the district court "to consider the question of mootness". *Byrne* v. *P.B.I.C.*, 401 U.S. 987. The district court found that the case was not moot and reinstituted its injunction. On remand, the district court heard argument not only the question of mootness but whether it should dissolve its injunction and/or vacate its declaratory judgment, the district court's action in reinstating its injunction and not vacating its declaratory judgment was correct.

A. DECLARATORY JUDGMENT.

*Zwickler* v. *Koota*, 389 U.S. 241, makes plain that with respect to non-pending prosecutions (compare *Samuels* v. *Mackell*, 401 U.S. 66 on pending prosecutions), the propriety of declaratory relief must be assessed separately from the grant of equitable relief. We think that there is no serious question that the district court properly granted a declaratory judgment on the question of the facial overbreath of the Massachusetts offenses here in question. Surely, the need for original intervention by declaratory relief was appropriate, particularly so where the state court had declined to act. And reinstatement of the declaratory relief was surely sound. Indeed, a *refusal* of federal declaratory relief is inconsistent with sound principles of federalism, *because significant federal court intervention had already occurred*. The district court had already declared unconstitutional the statutory and common law offenses of indecent exposure in the context of live theatre performances. This decision on the constitutional question will be *res judicata* in a subsequent criminal prosecution against plaintiffs.[1]

[1] In any subsequent prosecution by the Commonwealth, this Court's ruling will have a preclusive effect, *Perez* v. *Ledesma*, 401 U.S. 82, 84. The suggestion by Mr. Justice Brennan (401 U.S. at 125) that this may not be the case is not sound. The preclusive effect of the

If that effect is lost as a result of a finding of mootness,[2] the state supreme court will be free to reach a different result on the constitutional issue. Should it do so and should the Supreme Court decline *certiorari*, the matter will again be before the district court on a habeas corpus. The state court's decision will, of course, not be *res judicata*. *Fay* v. *Noia*, 372 U.S. 391. The awkwardness of such a situation is, of course, apparent. The critical point here, we submit, is that significant federal intervention has already occurred, at a point in time at which it was clearly called for. Accordingly, sound judicial administration dictates that the constitutional questions here presented be resolved within the framework of the present federal court litigation.

Finally, we would add that nothing in *Samuells* v. *Mackell*, 401 U.S. 66, precludes declaratory relief. In that case, the Court was dealing with *pending* state criminal prosecutions and held that, ordinarily, declaratory relief should not be given where injuctive relief would be inappropriate under *Younger* v. *Harris*, 401 U.S. 37. But there was no suggestion that declaratory relief would be unavailable if no criminal proceeding were pending. *Zwickler* v. *Koota*, 389 U.S. 241 was not overruled. Moreover, this case was *not* remanded for reconsideration in light of *Mackell*. (Compare the order for remand entered in this

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district court's judgment. In our view stems not only from accepted principles of *res judicata* (e.g., *Scott* v. *California Supreme Court*, 426 F.2s 300 (9 Cir. 1970), but is a necessary consequence of the Congressionally fashioned organization of the federal courts. It would radically distort the operation of the federal court system created by Congress if the judgments of the federal courts were not given a binding effect in any future litigation between the parties. Finally, and perhaps most importantly, if the judgment had no *res judicata* effect and could be revised in a subsequent state court proceeding it is doubtful whether the district court would have a "case or controversy" before it. Hart & Wechsler, *Federal Court and Federal System*, 100-102, 109-114, 136.

[2] If this case is dismissed as moot, the preclusive effect of the federal court ruling is uncertain. See *United States* v. *Munsingware, Inc.*, 340 U.S. 36, and *Disposition of Moot Cases by the United States Supreme Court*, 23 U. of Chic. L.Rev. 77, 96.

case with the orders entered at the same time in *Dyckes* v. *Ryan*, No. 5164; *Wade* v. *Buchanan*, No. 290; *Rollins* v. *Shannon*, No. 5013; *Wright* v. *City of Montgomery*, No. 28, all reported at 402 U.S. 987-89. What is more, *Mackell* clearly supports the issuance of declaratory relief here. *Mackell* restricted federal declaratory relief in pending state criminal prosecutions in order to avoid needless friction between the federal and state courts. Refusal of any federal relief was, therefore, justified in federalism terms. Here, as we have indicated, significant and entirely proper federal intervention had *already* occurred by virtue of the original decision of May 16, 1970, on the constitutionality of the Massachusetts offenses.

B. Reinstatement of Injunctive Relief.

Whether the injunction should have been reinstated is a matter not free from difficulty. As general propositions, it is of course, clear that a prayer for an injunction can become moot during an appeal (*Powell* v. *McCormack*, 395 U.S. 486, 517-18) and that changed conditions can warrant dissolution of an injunction even after a permanent injunction has been entered and the appeal process completed. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647-48; *Food Fair Stores* v. *Food Fair*, 177 F.2d 177, 186 (1 Cir. 1950). In this case, the critical issue would seem to be whether the injunction should have been reinstated if, pending the appeal, the wrongful conduct (i.e., the threat of criminal prosecutions) remains but some or all of the irreparable injury which supported the original issuance of injunction has been eliminated. In this regard, the federal court might act so as to protect those who exercised freedom of speech under the protection of the federal court injunction of May 16, 1970. See Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 517, 548. Moreover, it is possible that the present injury caused by one or more criminal prosecutions would by itself support injunctive relief, given the fact

that first amendment freedoms are involved. See opinion of Brennan, J. in *Perez* v. *Ledesma*, 401 U.S. 82, 93. It would, after all, be a matter of little comfort to the producers and cast of a play if they could be subject to multiple prosecutions one day after the play had closed. The "in terrorem" effect of the threat of criminal prosecutions would be considerable.

The question of the standards governing federal equitable relief against non-pending state prosecutions is, apparently, presently before this Court. E.g., *Roe* v. *Wade*, No. 70-18. Of course, we cannot propose to argue the matter extensively on a motion to affirm. However we urge that the reasoning of *Younger* should not be extended to that situation. The standards there set out for federal equitable intervention may well be appropriate in connection with state prosecutions for the regulation of the sale of bananas. But, we submit with deference, they show a remarkable insensitivity to the fact that free speech claims were involved. Moreover, *Younger* did not even advert to the possibility that the first amendment itself might *require* equitable relief in these circumstances. Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 517, 547-551. The insufficiency of the Court's reasoning is, we submit, not saved by the creation, capitalization and constant repetition of the slogan "Our Federalism." Compare *Zwickler* v. *Koota*, 389 U.S. 241, 247 — federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution."

Even if the original injunction should not have been reinstated, the judgment of the district court should be affirmed. Reinstatement is essentially harmless error. The grant of declaratory relief was clearly proper, and was plainly right on the merits. Accordingly, whether the injunction was erroneously issued or reinstated is a matter

of no importance since defendant will not prosecute if the district court's views are sustained on the merits. The Court has jurisdiction over the appeal and can decide the substantive issues. See Stewart & Blackmun, J.J., concurring in *Perez* v. *Ledesma*, 401 U.S. at 90. It would be inappropriate to remand this case to the district court once more on the limited question of equitable relief. The judgment should therefore be affirmed outright or modified so as at least to affirm the declaratory judgment.

Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-17

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,

*Appellant,*

—v.—

WILLIAM R. BAIRD,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

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IN THE

# Supreme Court of the United States

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**No. 70-17**

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,

*Appellant,*

—v.—

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*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

### Interest of Amici*

The American Civil Liberties Union, and its affiliate, the Civil Liberties Union of Massachusetts, are organizations whose basic commitment is to the preservation of personal liberty in the face of governmental actions which threaten to infringe constitutional guarantees of such liberty.

* Letters of consent for the filing of a brief *Amici Curiae* have been obtained from counsel for the respective parties and filed with the Clerk of the Court.

For many years, this institutional commitment has encompassed the right of privacy generally, and has included a particular concern with restrictions on the dissemination of information concerning, and on the use and distribution of, contraceptive devices.

In *Poe* v. *Ullman*, 367 U.S. 497 (1961), the American Civil Liberties Union and the Connecticut Civil Liberties Union filed a brief as *Amici Curiae* which fully articulated a right to privacy basis for a decision on behalf of appellants. This approach was substantially reflected in the majority opinions in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In the instant case, your *Amici* argue that similar grounds should underlie a decision for the appellee, William R. Baird.

## Questions Presented

1. Whether the restrictions on the distribution of contraceptive devices in Massachusetts G.L. c. 272 §§21 & 21A unconstitutionally burden the right of privacy of married and unmarried individuals who wish to employ such devices.

2. Whether the appellee has standing to assert the claim embodied in issue 1.

## The Opinions Below

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at 429 F.2d 1398 (1st Cir. 1970). The opinion of the District Court is reported at 310 F. Supp. 951 (1970). The opinion of the Massachusetts Supreme Judicial Court is reported at 355 Mass. 746, 247 N.E.2d 574 (1969).

## Statutes Involved

The Massachusetts statutes involved are Mass. G.L. c. 272 §21, as amended by Acts of 1966, c. 265, §3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

And Mass. G.L. c. 272, §21A, as inserted by Acts of 1966, c. 265, §1, which provides:

> "A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of section twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

## Statement of the Case

On April 6, 1970, Appellee addressed an audience of students and faculty at Boston University on the subject of birth control and over-population. His address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices in their original packages. In addition, petitioner spoke of the respective merits of various contraceptive devices; over-population in the world, crises throughout the world due to over-population; the large number of abortions performed on unwed mothers; quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Petitioner also encouraged members of the audience to petition the Massachusetts Legislature and to make known their feelings with regard to birth control laws in order to bring about a change in the laws. Petitioner further stated that he knew he was violating the

law and invited arrest. At the close of the address petitioner invited members of the audience to come to the stage and help themselves to the contraceptive articles. Petitioner personally handed a woman a package of Emko Vaginal Foam. He was then arrested and charged with exhibiting and delivering a contraceptive article, and subsequently convicted for violating Mass. G.L. c. 272, §§21, 21A. The Supreme Judicial Court of Massachusetts reversed the conviction for exhibiting on First Amendment grounds, but by a 4-3 vote upheld as constitutional the statute's prohibition on distribution. *Commonwealth* v. *Baird,* 355 Mass. 746. The United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts,* 396 U.S. 1029 (1970). Thereafter, a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts was dismissed. *Baird* v. *Eisenstadt,* 310 F. Supp. 951 (1970). On appeal, the United States Court of Appeals for the First Circuit vacated the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus, discharging Mr. Baird, *Baird* v. *Eisenstadt,* 429 F.2d 1398.

## ARGUMENT

### I.

**The Constitution protects the right of personal choice over those events which, by their character and consequences, bear in a fundamental manner on physical and sexual privacy; clearly included within this protection is the right of married and single individuals to employ contraceptive devices.**

The right of free personal choice—of autonomy—over one's own body was recognized by this Court eighty years ago:

> No right is more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, the right to one's person may be said to be a right of complete immunity: "to be let alone." *Union Pac. Ry.* v. *Botsford,* 191 U.S. 250, 251 (1891).

The right to be let alone has matured as the concept of a right of privacy, constitutionally interposed between the state and those individual activities which are properly regarded as beyond the legitimate reach of public observation or control:

> "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

> 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' Olmstead v. United States, 277 U.S. 438, 478, 72 L. Ed. 944, 956, 48 S. Ct. 464, 66 ALR 376 (1928) (Brandeis, J., dissenting). See Griswold v. Connecticut, supra; cf. NAACP v. Alabama, 377 U.S. 449, 462, 2 L. Ed. 2d 1488, 1499, 78 S. Ct. 1163 (1958)." *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969).

The area of activity which has been the most prominent beneficiary of the constitutional tradition of individual autonomy is that concerning marriage, the family, and sexual relationships. See, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), where a unanimous court held that the "right to have offspring" was a basic "human right"; and *Loving* v. *Virginia,* 388 U.S. 1010 where marriage was described as "one of the 'basic civil rights of man; fundamental to our very existence and survival' ", 388 U.S. at 12 (quoting from *Skinner* v. *Oklahoma, supra*); see also *Pierce* v. *Society of Sisters,* 368 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) and *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944).

In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), a Connecticut statute making criminal the use of "any drug, medicinal article or instrument for the purpose of prevent-

ing conception," was reviewed and invalidated by the Court. The appellants were the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician, both of whom had given advice and instruction on the use of contraceptive devices, and had been convicted as accessories to the crime of such use.

While the appropriate textual and doctrinal foundation for the Court's judgment was a matter of significant disagreement, there was full accord among the seven Justices in the majority as to the essence of that judgment: namely, that the sexual intimacies of man and wife are correctly considered to be private matters into which the state may not—at least without compelling justification*—intrude, and that the right to privacy in such matters is fundamental to our constitutional order. See 381 U.S. at 485, 486, 495 *et seq.* and 503-504; see also, *Poe* v. *Ullman*, 367 U.S. 497, 550-55 (1961) (dissenting opinion of Mr. Justice Harlan). The consensus can be stated more broadly as embracing the proposition that "[t]here are limits to the extent to which a legislatively representative majority may conduct . . . experiments at the expense of the dignity and personality" of the individual, *Poe* v. *Ullman, supra*, 367 U.S. at 555 (dissenting opinion of Mr. Justice Harlan), quoting from *Skinner* v. *Oklahoma, supra*, 316 U.S. at 535 (concurring opinion of Mr. Justice Jackson).

The textual basis within the Constitution of the fundamental right of privacy articulated in *Griswold* was the subject of disagreement among the Justices who concurred in the judgment that such a right existed. Mr. Justice

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* See discussion as to applicability of compelling interest analysis on pages 14-15, *infra*.

Douglas, who wrote for the Court, relied upon the "penumbra" of privacy generated by the First, Third, Fourth, Fifth and Ninth Amendments. 381 U.S. at 484-85. Mr. Justice Goldberg, in whose concurring opinion Mr. Chief Justice Warren and Mr. Justice Brennan joined, stressed the importance of the Ninth Amendment as lending "strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." 381 U.S. at 488-494. Mr. Justice Harlan concurred on the basis of the Due Process Clause of the Fourteenth Amendment of and in itself, determining that the challenged legislation violated "basic values 'implicit in the concept of ordered liberty,'" 381 U.S. at 500, quoting *Palko* v. *Connecticut*, 302 U.S. 319; 325 (1937); see also *Poe* v. *Ullman, supra*, 367 U.S. at 349-355 (dissenting opinion of Mr. Justice Harlan). Mr. Justice White, in his concurring opinion, also drew support from the Due Process Clause. 381 U.S. at 502-03.

Thus, seven Justices of this Court agreed in *Griswold* that there is an important right of privacy to which the Connecticut contraceptive legislation did violence. This consensus was arrived at notwithstanding the silence of the Constitution's text on the matter, and the absence of agreement as to an acceptable doctrinal means of overcoming that silence. Such a consensus, in the face of these analytical difficulties, is itself compelling evidence of the fundamental nature of the right to privacy in the context of intimate sexual relationships.

In the wake of *Griswold*, a variety of Courts have been asked to extend the reach of its protection to include the

right of a woman to secure an abortion. The response has been almost uniformly affirmative. In *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Texas 1970), *juris. postponed to hearing on merits*, 401 U.S. —— (May 3, 1971) (No. 70-18, 1971 Term), the three-judge District Court recognized: "the right of choice over events which, by their character and consequence, bear in a fundamental manner on the privacy of individuals." 314 F. Supp. at 1221. Accordingly, the Court found there to be a "fundamental right to choose whether to have children." *Id.* at 222. The three-judge District Court in *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *juris. postponed to hearing on merits*, 401 U.S. —— (May 3, 1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term), reached a similar conclusion:

> Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510 (1965); California v. Belous, 71 Cal.2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S. Ct. 920, 25 L. Ed.2d 96 (1970). The question becomes a matter of statutory overbreadth. 319 F. Supp. at 1056.

In *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. E.D. 1971), *appeal docketed sub nom., Hanrahan* v. *Doe*, 39 U.S. Law Week 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term), yet another three-judge District Court invalidated statutory inhibitions on

the obtaining of abortions, in deference to "women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation." 321 F. Supp. at 1389. The Supreme Court of the State of California has likewise observed that "[t]he fundamental right of woman to choose whether to bear children follows the Supreme Court's and this Court's repeated acknowledgment of 'a right of privacy' or 'liberty' in matters related to marriage, family and sex." *People* v. *Belous*, 80 Cal. Rptr. 354 (1968), *cert. den.*, 397 U.S. 915 (1970). See also *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), *appeal dis. for want of juris.*, 400 U.S. 1 (1970).

In both language and result,* these subsequent decisions interpret *Griswold* v. *Connecticut, supra*, as establishing a right of sexual privacy which extends to both married and single men and women. Even Courts which have not been willing to extend the *Griswold* rationale to the abortion context have restated the right to contraception in terms of broadest applicability. Thus, in *Steinberg* v. *Brown*, 321 F. Supp. 741 (1970), the three-judge District Court upheld the challenged abortion statute but recognized that "[t]he right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere." 321 F. Supp. at 746. See also *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1222 (1970).

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* For example, the claims of single women were expressly before the Courts and encompassed in their favorable rulings in *Roe* v. *Wade, supra*, 314 F. Supp. at 1219-20; *Doe* v. *Bolton, supra*, 319 F. Supp. at 1050-54; and *People* v. *Belous, supra*, 80 Cal. Rptr. at 355.

The Court of Appeals for the First Circuit, in finding for the appellee, William R. Baird, took a similar view of the reach of *Griswold*:

> To say that contraceptives are immoral as such, and are forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for Society a possible obligation of support. Such a view of morality is not only the very image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competancy of the State. See the various opinions in *Griswold* v. *Connecticut,* ante, particularly those of Mr. Justice Harlan and Mr. Justice White, concurring. See also *Richards* v. *Thurston,* 1 Cir., 4-28-70.

In applying this Court's decision on *Griswold* v. *Connecticut,* State and federal tribunals alike have thus interpreted the right of sexual privacy as one which extends to single men and women. Any other interpretation would expose to State control decisions which lie at the very heart of physical, sexual and emotional intimacy.

## II.

## The Massachusetts legislation unconstitutionally burdens the right to employ contraceptive devices.

### A. *The Massachusetts Law Seriously Burdens Both Single and Married Persons in the Exercise of the Right to Employ Contraceptive Devices.*

Until 1966, the distribution of contraceptive devices was prohibited in Massachusetts. In 1966, after the Court's decision in *Griswold* v. *Connecticut,* the prohibitory statute (Mass. G.L. c. 272 Section 21) was amended to permit the administration or prescription of such devices by a registered physician for married persons, and the furnishing of prescribed devices by a registered pharmacist. The legislature, quite clearly, was making "what it thought to be the precise accommodation necessary to escape the *Griswold* ruling." *Baird* v. *Eisenstadt, supra,* 429 F.2d at 1401; see also, *Commonwealth* v. *Baird, supra,* 1969 Mass. A.S. at 729, 247 N.E.2d at 576 (1969).

The Massachusetts legislature was successful in devising a statutory scheme which avoided—on a formal and narrow reading—the ruling in *Griswold* and yet maintained a formidable deterrent to the use of contraceptives. Under it, single people are prevented entirely from lawfully securing contraceptive devices within the state. This effectively leaves unmarried people the options of securing such devices from outside the State, securing them illegally, or foregoing their use.

Married people can secure such devices within the State, but only after undergoing the expense and inconvenience of formal consultation with a licensed physician. In addi-

tion to the general deterrent force of such inconvenience, there is the very real possibility that at any given time a married couple may be unable to see a doctor immediately. Newlyweds face the peculiar dilemma of having to see a doctor after their wedding and before their wedding night. The Massachusetts law therefore, seriously burdens the marital relationship.

**B. *The Massachusetts Contraceptive Law Is Unredeemed by Any Legislative Interest Which It Serves.***

**1. The applicable test.**

In evaluating the claim that some state interest justifies a legislative infringement upon the right of sexual privacy delineated above, Courts have drawn upon two alternate modes of analysis. One approach has been to require the justification of the infringement by a compelling state interest. This approach has predominated in the recent judicial evaluations of restrictive state abortion statutes. See, *e.g., Roe* v. *Wade, supra,* 314 F. Supp. at 1222; *People* v. *Belous, supra,* 80 Cal. Rptr. at 360; and *Doe* v. *Scott, supra,* 321 F. Supp. at 1390. It is the basis of two of the concurring opinions in *Griswold* v. *Connecticut.* See 381 U.S. at 497 (concurring opinion of Mr. Justice Goldberg); and 381 U.S. at 503-04 (concurring opinion of Mr. Justice White).

The alternative approach is to define with some precision the boundaries of the right to privacy which is being respected, and, within those boundaries, treat the right as an absolute protection against state intrusion. Hence, the Court in *Doe* v. *Bolton, supra,* found the right to be free from state interference as regards the *reasons* for seeking

an abortion to lie with the right of sexual privacy and treated it as an absolute right:

> Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the state may not do. . . . The question becomes a matter of statutory overbreadth. 319 F. Supp. at 1056.

A similar analytical process underlay the dissenting opinion of Mr. Justice Harlan in *Poe* v. *Ullman, supra,* where the details of married intimacy are placed beyond the reach of the State:

> It is one thing when the state exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledge a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. 367 U.S. at 553.

The majority opinion in *Griswold* likewise appears to be bottomed on this form of analysis. See 381 U.S. at 485-86.

Either means of analysis yields the same conclusion in the instant case. The Massachusetts contraceptive legislation plainly trespasses upon the area of sexual privacy which should be protected absolutely from intrusion by the state. Moreover, it is unsupported by a compelling state interest, or indeed by any interest even approaching the threshold of compelling importance. These conclusions will be amplified in the discussion which follows.

**2. State interests.**

(a) *Massachusetts' moral judgment about the use of contraceptives.*

Prior to 1966, the contraceptive statute was contained in the chapter of the Massachusetts laws pertaining to "Crimes Against Chastity, Morality, Decency and Good Order," and the prescription or distribution of contraceptives was completely forbidden. It is apparent, as noted above, that the purpose of the legislation was and is to prevent the use of contraceptives *per se*, on independent moral grounds, and that the 1966 amendments to the legislation were merely designed to circumvent the limitations of this Court's decision in *Griswold*. See *Baird* v. *Eisenstadt, supra,* 429 F.2d at 1401.

This legislative goal, while well served by the challenged enactment in its present form, cannot provide its constitutional justification. Whatever the ultimate reach of the right to sexual privacy, it surely encompasses the right of individuals to decide whether or not to prevent conception. Defined absolutely, the right of privacy involved must extend that far. The very essence of the intrusion to be condemned is that of the State placing married and single individuals in the position of having to suffer the risk of an unwanted pregnancy, of an abortion or of foregoing sexual intercourse. To do so in the name of a corporate moral judgment that contraception is wrong is to substitute the judgment of the State for that of the individual on a matter of the most sensitive and intimate sort. The State is remolding the physical and emotional contours of the human sexual experience on the basis of its moral determination about contraceptives. Similarly, were such a basis to be

accepted as satisfying the compelling state interest test, there could be effectively no right of sexual privacy.

If *Griswold* stands for nothing else, it stands for the proposition that a moral judgment against contraceptives cannot be effectuated by State restraint upon their use.

(b) *The State's interest in health.*

The Supreme Judicial Court of Massachusetts found justification for the statute in the proposition that "[t]he Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent contraception which may have undesirable, if not dangerous, physical consequences." *Commonwealth* v. *Baird, supra,* 355 Mass. at 753.

At the outset, it must be recognized that health concerns bear no relationship at all to the complete exclusion of unmarried persons from the statutory scheme. Clearly the distinction between married and unmarried persons cannot be sustained on this basis.

The requirement of a licensed physician's prescription of contraceptives for married persons cannot be separated from the exclusion of unmarried persons, for it provides strong support for the finding of the Court of Appeals below:

> On this record we do not believe that the legislature suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodations necessary to escape the *Griswold* ruling. 429 F.2d at 1401.

More striking support for this view is found in the circumstance that prior to the 1966 *Griswold* accommodation, Massachusetts physicians were forbidden to prescribe contraceptive devices, even when the health of their patients required their use. See *Baird* v. *Eisenstadt*, *supra*, 429 F.2d at 1401.

Even if taken at face value, the requirement that all contraceptive devices be distributed only upon prescription, however safe their use has been proven to be, is palpably overbroad. In the words of the Court of Appeals:

> In addition, we must take notice that not all contraceptive devices risk "undesirable * * * [or] dangerous physical consequences." It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a "redingote anglais." The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. Petitioner says this is true of vaginal foam. Since he failed to prove it, we cannot so find, but we may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless. 429 F.2d at 1401.

The indiscriminate breadth of the prescription requirement, of course, is reinforcement for the view that health is by no means the target of the legislation.

In light of the foregoing, it is difficult to credit the view that legitimate State concerns about the health of its citizens should be invoked to preserve the statute, in whole or part. The statute in its present form is the product of a kind of constitutional minimalism, wherein a patently unconstitutional law is reformed in the most limited way possible, in order to preserve its essence. Here, the essence of the legislation is clearly that which is constitutionally objectionable, namely, the State's assertion of a moral view concerning the decision of individuals to prevent conceptions.

Even if this aspect of the health contention is set aside, the statute cannot be justified on these grounds. Clearly, the exclusion of unmarried persons cannot be so supported. Neither can the overbroad requirement of a doctor's prescription for all contraception devices, however innocuous. Given the fundamental nature of the constitutional right of privacy involved, the problem of overbreadth is especially acute. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). See also, *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 485; and *United States* v. *Robel*, 389 U.S. 258, 265-66 (1967).

It should be noted that the most dramatic effect of the contraceptive legislation on the health of Massachusetts residents is adverse. Unwanted pregnancies, even in a healthy woman, expose her to the not inconsiderable risks which attend any pregnancy, to the possibility of an abortion, with its attendant risks, and to serious mental anxiety. By preventing unmarried persons from securing medical assistance vis-a-vis those contraceptive devices which do require continuing professional supervision, the law en-

courages the dangerous employment of such devices without medical supervision. Finally, the statute may well result in an increase of illegitimate births,* with an attendant infliction of emotional harm on the children and the parents involved, and a serious drain on social resources.

In the face of all of the foregoing analysis of the relationship between the health of Massachusetts' residents and the challenged statute, it surely cannot be said that the statute—with its patent overbreadth and thinly disguised evasion of *Griswold*—promotes a compelling State interest in health. Neither can it be said that the State's interest in health is such that an appropriately delineated right of privacy would be compatible with the law's reach. A carefully drawn statute, which required a prescription for those contraceptive devices which require medical supervision, and treated single and married persons alike, would advance a compelling interest of the State, and presumably, would not conflict with an appropriately deline-

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* Except for 1914, there are no figures on illegitimacy in Massachusetts for the years prior to 1961. From 1961 to 1968 the absolute number of illegitimate births, and their proportion of all births has increased. In 1961, 3042 births or 2.7% of all births to Massachusetts residents were out-of-wedlock. In 1968, the figures were 5626 births and 6.1% of all births. Beth Murphy, "Out of Wedlock Births in Massachusetts, 1961-1968," p. 2 (unpublished paper prepared for Massachusetts Department of Public Health).

For the years 1966-1968, 24% of white and 41% of non-white legitimate first births to Massachusetts residents were conceived before the marriage of their parents. When the number of illegitimate births is added to this figure, 31% of white and 64% of non-white first births occurring in 1966-68 were non-maritally conceived. Beth Murphy, "The Temporal Relationship of Marriage, Conception and Birth in Massachusetts, 1966-1968," pp. 7-8 (unpublished paper prepared for the Massachusetts Department of Public Health and Harvard University School of Public Health).

ated right of sexual privacy. But, as demonstrated above, the challenged provision falls radically short of such a model.

(c) *The interest of the State on the morality of sexual behavior.*

The only remaining colorable interest of the Commonwealth of Massachusetts in the Statute is that of deterring pre-marital sex. (The Statute, of course, has no special relationship to the extra-marital sexual activities of married persons.)

As in the health interest, there is here some serious question as to whether the statute is in fact addressed to sexual morality. Fornication in Massachusetts is a misdemeanor punishable by a maximum of a thirty dollar fine or three months in jail (Mass. G.L. c. 272), while violation of the instant Statute is a felony punishable by up to five years in prison. It is indeed "hard to believe that the legislature adepted a Statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of a ninety-day misdemeanor." *Baird* v. *Eisenstadt, supra,* 429 F.2d 1401. Again the history of the statute, with its pre-1966 prohibition on all distribution of contraceptives, undercuts the proferred State interest. The prohibition on married persons obtaining contraceptives could hardly have been addressed to the prevention of extra-marital sexual activities.

As the accepted scope of the right of privacy expands, the notion that a state has a legitimate interest in adjusting the sexual morality of its citizens is itself open to serious

question. See e.g., *Buchanan* v. *Batchelor*, 308 F. Supp. 729 (3d Ct. N.D. Tex. 1970).

If the State does have a secure basis for a proscription of fornication it is the interest in reducing the birth rate of illegitimate children. The Massachusetts law accomplishes just the reverse, presumably, by greatly burdening the use of contraceptives.*

But if it is assumed, arguendo, that sexual morality can plausibly be considered a goal of the legislation, and that such a goal is permissable, it cannot save the statute. These assumptions could validate a statute making fornication illegal. They cannot justify a statutory scheme which (1) seriously burdens the marital relationship; (2) subjects unmarried persons to the physical and emotional risks of an unwanted pregnancy.

If the State has any interest and place in defining sexual morality, it can do so with its criminal laws directly. Restricting access to contraceptives exacts a high price in personal privacy and returns to the State an indirect and ineffective curb on sexual activities which the State condemns. Above all, if viewed as a means of enforcing sexual morality, the statute emerges as a grossly indiscriminate undertaking. Pre-marital sexual activities are burdened far more heavily than extra-marital sexual activities by married individuals. And the married sexual activities of individuals are burdened just as heavily as their extra-marital ones.

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* See footnote on page 20, *supra*.

## III.

**In challenging the validity of his conviction, appellee may assert the statute's adverse effect on the fundamental rights of third parties not within the statute's prohibition.**

Whether the fundamental rights of privacy and liberty infringed by the statute are possessed by all unmarried adults, or are special to married persons, the appellee has standing to challenge the constitutional validity of the statute under which he is being prosecuted. The injury to his liberty and pocketbook is direct and substantial: he has been prosecuted, convicted and jailed. There is no question that one against whom a criminal statute is enforced has interest in questioning that statute's validity to constitute a "case or controversy" within the meaning of Article III. *Baird* v. *Eisenstadt, supra* at 1402.

This Court, however, has developed rules of self-restraint that limit the constitutional attacks which a party directly affected by a statute's operation may make. *Barrows* v. *Jackson*, 346 U.S. 249, 255. Under these canons of practice, or "standing" as they are sometimes called, a person ordinarily may not assert that a statute infringes the rights of third parties not personal to him. Thus a person may not assert that a statute, though constitutional as applied to him, is unconstitutional as applied to third parties coming within a possible future application of that statute. *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217; *United States* v. *Raines*, 326 U.S. 17, 21. The policy reasons for this rule are discussed in *Barrows* v. *Jackson, supra* at 256.

It is equally well-established that in unique situations where it would be difficult if not impossible for the third person to protect his rights in a future proceeding, the need to protect the fundamental rights of third parties will outweigh the rule of practice, and their rights may be asserted by the party before the court. *Barrows* v. *Jackson, supra* at 256. In *Pierce, supra, Barrows* v. *Jackson, supra, NAACP* v. *Alabama,* 357 U.S. 449, 462, and *Griswold, supra,* individuals directly injured by the operation of a statute could challenge its validity by asserting third party rights adversely affected and not otherwise subject to protection in a judicial proceedings. See Sedler, "Standing to Assert Constitutional *Jus Tertii* in the Supreme Court," 71 *Yale L.J.* 599, 600, 626-633 (1962); Note, "The Overbreadth Doctrine," 83 *Harvard L.R.* 844, 847-851 (1971).

The case at bar clearly falls within the "unique situation" rule enunciated in *Barrows* as essential to the protection of fundamental rights. The statute is directed only at distributors, and since it does not penalize use or possession of contraceptives by individuals, it is unlikely that the rights of unmarried and married adults, unless raised by appellee, can ever be protected in a judicial forum. Unlike the situation in *United States* v. *Raines, supra,* and the typically overbroad situation, where the third party rights can be asserted when the statute is directly applied against them, married and unmarried persons who do not distribute contraceptives can never be prosecuted under this statute. Thus they are effectively denied the opportunity to challenge a statute that substantially burdens their rights.

An additional reason for applying the unique situation rule is that the abridged rights are fundamental ones. Clearly the right to educate one's children, the right to as-

sociate freely, and the right to buy a house free of racial discrimination, protected in previous applications of the unique situation rule, are no more deserving of protection than the right to exercise control over bodily and emotional processes and individual identity. *Griswold, supra* at 486.

Furthermore, since appellee's interest in avoiding conviction is substantial, he is as likely and as well-equipped to present as vigorous and well-documented defense of third-party rights as those persons themselves. The situation is not one where the court is forced to judge the statute in terms of hypothetical applications uninformed by the in-depth factual presentation of one motivated by his own personal rights. Appellee, in addition, stands in a particular relationship to third parties that accredits him as their spokesman. For several years appellee has singlehandedly campaigned against outmoded laws, and undergone prosecution and jail to enable married and unmarried persons to obtain contraceptives without unnecessary and unlawful burdens. Surely he is likely to assert those rights as vigorously as the holders themselves. Secondly, the right at issue is that of unmarried and married adults to obtain harmless contraceptives from non-medical distributors, without the delay, expense and inconvenience of obtaining a doctor's prescription—precisely the position of appellee vis-a-vis the parties whose interests he asserts. *Griswold, supra,* at at 481, 482.

## CONCLUSION

**The judgment of the Court of Appeals for the First Circuit should be affirmed.**

Respectfully submitted,

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October 25, 1971

# EISENSTADT, SHERIFF *v.* BAIRD

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 70–17. Argued November 17–18, 1971—Decided March 22, 1972

Appellee attacks his conviction of violating Massachusetts law for giving a woman a contraceptive foam at the close of his lecture to students on contraception. That law makes it a felony for anyone to give away a drug, medicine, instrument, or article for the prevention of conception except in the case of (1) a registered physician administering or prescribing it for a married person or (2) an active registered pharmacist furnishing it to a married person presenting a registered physician's prescription. The District Court dismissed appellee's petition for a writ of habeas corpus. The Court of Appeals vacated the dismissal, holding that the statute is a prohibition on contraception *per se* and conflicts "with fundamental human rights" under *Griswold* v. *Connecticut*, 381 U. S. 479. Appellant, *inter alia*, argues that appellee lacks standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under the statute nor a single person unable to obtain contraceptives. *Held:*

1. If, as the Court of Appeals held, the statute under which appellee was convicted is not a health measure, appellee may not be prevented, because he was not an authorized distributor, from attacking the statute in its alleged discriminatory application to potential distributees. Appellee, furthermore, has standing to assert the rights of unmarried persons denied access to contraceptives because their ability to obtain them will be materially impaired by enforcement of the statute. Cf. *Griswold, supra*; *Barrows* v. *Jackson*, 346 U. S. 249. Pp. 443–446.

2. By providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 446–455.

(a) The deterrence of fornication, a 90-day misdemeanor under Massachusetts law, cannot reasonably be regarded as the purpose of the statute, since the statute is riddled with exceptions making contraceptives freely available for use in premarital sexual

relations and its scope and penalty structure are inconsistent with that purpose. Pp. 447–450.

(b) Similarly, the protection of public health through the regulation of the distribution of potentially harmful articles cannot reasonably be regarded as the purpose of the law, since, if health were the rationale, the statute would be both discriminatory and overbroad, and federal and state laws already regulated the distribution of drugs unsafe for use except under the supervision of a licensed physician. Pp. 450–452.

(c) Nor can the statute be sustained simply as a prohibition on contraception *per se*, for whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under *Griswold*, *supra*, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since the constitutionally protected right of privacy inheres in the individual, not the marital couple. If, on the other hand, *Griswold* is no bar to a prohibition on the distribution of contraceptives, a prohibition limited to unmarried persons would be underinclusive and invidiously discriminatory. Pp. 452–455.

429 F. 2d 1398, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, and MARSHALL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 455. WHITE, J., filed an opinion concurring in the result, in which BLACKMUN, J., joined, *post*, p. 460. BURGER, C. J., filed a dissenting opinion, *post*, p. 465. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

*Joseph R. Nolan*, Special Assistant Attorney General of Massachusetts, argued the cause for appellant. With him on the brief were *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, and *Ruth I. Abrams*, Assistant Attorneys General, and *Garrett H. Byrne*.

*Joseph D. Tydings* argued the cause for appellee. With him on the briefs was *Joseph J. Balliro*.

Briefs of *amici curiae* urging affirmance were filed by *Harriet F. Pilpel* and *Nancy F. Wechsler* for the

Planned Parenthood Federation of America, Inc.; by *Roger P. Stokey* for the Planned Parenthood League of Massachusetts; by *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Sylvia S. Ellison* for Human Rights for Women, Inc.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.[1] The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth* v. *Baird*, 355 Mass. 746, 247 N. E. 2d 574 (1969). Baird subsequently filed a petition for a federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. 429 F. 2d 1398 (1970). This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. 401 U. S. 934 (1971). We affirm.

Massachusetts General Laws Ann., c. 272, § 21, under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever

[1] The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F. 2d 1398, 1399 (1970). However, there is no evidence in the record about her marital status.

for the prevention of conception," except as authorized in § 21A. Under § 21A, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." [2] As interpreted by the State Supreme Judicial

[2] Section 21 provides in full:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Section 21A provides in full:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of § 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees—*first*, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; *second*, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, *third*, married or single persons may obtain contraceptives from anyone to prevent not pregnancy, but the spread of disease. This construction of state law is, of course, binding on us. *E. g., Groppi* v. *Wisconsin*, 400 U. S. 505, 507 (1971).

The legislative purposes that the statute is meant to serve are not altogether clear. In *Commonwealth* v. *Baird*, *supra*, the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens: "[T]he prohibition in § 21," the court declared, "is directly related to" the State's goal of "preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." 355 Mass., at 753, 247 N. E. 2d, at 578. In a subsequent decision, *Sturgis* v. *Attorney General*, — Mass. —, —, 260 N. E. 2d 687, 690 (1970), the court, however, found "a second and more compelling ground for upholding the statute"—namely, to protect morals through "regulating the private sexual lives of single persons." [3] The Court of Appeals, for reasons that will

[3] Appellant suggests that the purpose of the Massachusetts statute is to promote marital fidelity as well as to discourage premarital sex. Under § 21A, however, contraceptives may be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put. Plainly the legislation has no deterrent effect on extramarital sexual relations.

appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself—a purpose that the court held conflicted "with fundamental human rights" under *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), where this Court struck down Connecticut's prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy. 429 F. 2d, at 1401–1402.

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of §§ 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

## I

We address at the outset appellant's contention that Baird does not have standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under § 21A nor a single person unable to obtain contraceptives. There can be no question, of course, that Baird has sufficient interest in challenging the statute's validity to satisfy the "case or controversy" requirement of Article III of the Constitution.[4] Appellant's argument, however, is that

[4] This factor decisively distinguishes *Tileston* v. *Ullman*, 318 U. S. 44 (1943), where the Court held that a physician lacked standing to bring an action for declaratory relief to challenge, on behalf of his patients, the Connecticut law prohibiting the use of contraceptives. The patients were fully able to bring their own action. Underlying the decision was the concern that "the standards of 'case or controversy' in Article III of the Constitution [not] become blurred," *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965)—a problem that is not at all involved in this case.

this case is governed by the Court's self-imposed rules of restraint, *first*, that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional," *United States* v. *Raines*, 362 U. S. 17, 21 (1960), and, *second*, the "closely related corollary that a litigant may only assert his own constitutional rights or immunities," *id.*, at 22. Here, appellant contends that Baird's conviction rests on the restriction in § 21A on permissible distributors and that that restriction serves a valid health interest independent of the limitation on authorized distributees. Appellant urges, therefore, that Baird's action in giving away the foam fell squarely within the conduct that the legislature meant and had power to prohibit and that Baird should not be allowed to attack the statute in its application to potential recipients. In any event, appellant concludes, since Baird was not himself a single person denied access to contraceptives, he should not be heard to assert their rights. We cannot agree.

The Court of Appeals held that the statute under which Baird was convicted is not a health measure. If that view is correct, we do not see how Baird may be prevented, because he was neither a doctor nor a druggist, from attacking the statute in its alleged discriminatory application to potential distributees. We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case just as in *Griswold* v. *Connecticut, supra.* There the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using contraceptives were held to have standing to raise the constitutional rights of the patients with whom they had a professional relationship.

Appellant here argues that the absence of a professional or aiding-and-abetting relationship distinguishes this case from *Griswold*. Yet, as the Court's discussion of prior authority in *Griswold*, 381 U. S., at 481, indicates, the doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another. Indeed, in *Barrows* v. *Jackson*, 346 U. S. 249 (1953), a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the covenant violated the equal protection rights of prospective non-Caucasian purchasers. The relationship there between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself. Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 631 (1962). And so here the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives.

In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests.[5] In *Griswold*, 381 U. S., at 481, the

[5] Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech. *E. g., Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). See *United States* v. *Raines*, 362 U. S. 17, 22 (1960).

Court stated: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." A similar situation obtains here. Enforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives. In fact, the case for according standing to assert third-party rights is stronger in this regard here than in *Griswold* because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights. Cf. *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Barrows* v. *Jackson*, *supra*.[6] The Massachusetts statute, unlike the Connecticut law considered in *Griswold*, prohibits not use, but distribution.

For the foregoing reasons we hold that Baird, who is now in a position, and plainly has an adequate incentive, to assert the rights of unmarried persons denied access to contraceptives, has standing to do so. We turn to the merits.

## II

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As THE CHIEF JUSTICE only recently explained in *Reed* v. *Reed*, 404 U. S. 71, 75–76 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment

[6] See also *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), where a custodian, in violation of state law, furnished a child with magazines to distribute on the streets. The Court there implicitly held that the custodian had standing to assert alleged freedom of religion and equal protection rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself.

does not deny to States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U. S. 27 (1885); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *Railway Express Agency* v. *New York*, 336 U. S. 106 (1949); *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)."

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§ 21 and 21A.[7] For the reasons that follow, we conclude that no such ground exists.

*First.* Section 21 stems from Mass. Stat. 1879, c. 159, § 1, which prohibited, without exception, distribution of articles intended to be used as contraceptives. In *Commonwealth* v. *Allison*, 227 Mass. 57, 62, 116 N. E. 265,

[7] Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. *E. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Loving* v. *Virginia*, 388 U. S. 1 (1967). But just as in *Reed* v. *Reed*, 404 U. S. 71 (1971), we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

266 (1917), the Massachusetts Supreme Judicial Court explained that the law's "plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." Although the State clearly abandoned that purpose with the enactment of § 21A at least insofar as the illicit sexual activities of married persons are concerned, see n. 3, *supra*, the court reiterated in *Sturgis* v. *Attorney General*, *supra*, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies," *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955), we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts General Laws Ann., c. 272, § 18. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective. What Mr. Justice Goldberg said in *Griswold* v. *Connecticut*, *supra*, at 498 (concurring opinion), concerning the effect of Connecticut's prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. "The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the

prevention of disease, as distinguished from the prevention of conception." See also *id.*, at 505–507 (WHITE, J., concurring in judgment). Like Connecticut's laws, §§ 21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent not pregnancy, but the spread of disease. *Commonwealth* v. *Corbett*, 307 Mass. 7, 29 N. E. 2d 151 (1940), cited with approval in *Commonwealth* v. *Baird*, 355 Mass., at 754, 247 N. E. 2d, at 579. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, §§ 21 and 21A on their face have a dubious relation to the State's criminal prohibition on fornication. As the Court of Appeals explained, "Fornication is a misdemeanor [in Massachusetts], entailing a thirty dollar fine, or three months in jail. Mass. G. L. c. 272 § 18. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." 429 F. 2d, at 1401. Even conceding the legislature a full measure of discretion in fashioning means to prevent fornication, and recognizing that the State may seek to deter prohibited conduct by punishing more severely those who facilitate than those who actually engage in its commission, we, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply *gives away* a contraceptive to

*20* times the *90-day* sentence of the offender himself. The very terms of the State's criminal statutes, coupled with the *de minimis* effect of §§ 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.

*Second.* Section 21A was added to the Massachusetts General Laws by Stat. 1966, c. 265, § 1. The Supreme Judicial Court in *Commonwealth* v. *Baird*, *supra*, held that the purpose of the amendment was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such purpose in mind before the enactment of § 21A. As the Court of Appeals remarked, "Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Commonwealth v. Gardner, 1938, 300 Mass. 372, 15 N. E. 2d 222." 429 F. 2d, at 1401. Nor did the Court of Appeals "believe that the legislature [in enacting § 21A] suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling." *Ibid.*

Again, we must agree with the Court of Appeals. If health were the rationale of § 21A, the statute would be both discriminatory and overbroad. Dissenting in *Commonwealth* v. *Baird*, 355 Mass., at 758, 247 N. E. 2d, at 581, Justices Whittemore and Cutter stated that they saw "in § 21 and § 21A, read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons."

The Court of Appeals added: "If the prohibition [on distribution to unmarried persons] . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality." 429 F. 2d, at 1401.[8] Furthermore, we must join the Court of Appeals in noting that not all contraceptives are potentially dangerous.[9] As a result, if the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married, a fact that the Supreme Judicial Court itself seems to have conceded in *Sturgis* v. *Attorney General*, — Mass., at —, 260 N. E. 2d, at 690, where it noted that "it may well be that certain contraceptive medication and devices constitute no hazard to health, in which event it could be argued that the statute swept too broadly in its prohibition." "In this posture," as the Court of

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[8] Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.

[9] The Court of Appeals stated, 429 F. 2d, at 1401:

"[W]e must take notice that not all contraceptive devices risk 'undesirable . . . [or] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products."

Appeals concluded, "it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married." 429 F. 2d, at 1401.

But if further proof that the Massachusetts statute is not a health measure is necessary, the argument of Justice Spiegel, who also dissented in *Commonwealth* v. *Baird*, 355 Mass., at 759, 247 N. E. 2d, at 582, is conclusive: "It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles 'which may have undesirable, if not dangerous, physical consequences.' If that was the Legislature's goal, § 21 is not required" in view of the federal and state laws *already* regulating the distribution of harmful drugs. See Federal Food, Drug, and Cosmetic Act, § 503, 52 Stat. 1051, as amended, 21 U. S. C. § 353; Mass. Gen. Laws Ann., c. 94, § 187A, as amended. We conclude, accordingly, that, despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.

*Third.* If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis "led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration." 429 F. 2d, at 1401–1402. The Court of Appeals went on to hold, *id.*, at 1402:

> "'To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and

for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state."

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley* v. *Georgia*, 394 U. S. 557 (1969).[10] See also *Skinner* v. *Okla-*

[10] In *Stanley*, 394 U. S., at 564, the Court stated:

"[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

" 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government,

*homa*, 316 U. S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29 (1905).

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. Mr. Justice Jackson, concurring in *Railway Express Agency* v. *New York*, 336 U. S. 106, 112–113 (1949), made the point:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Although Mr. Justice Jackson's comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massa-

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the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

"See *Griswold* v. *Connecticut*, *supra*; cf. *NAACP* v. *Alabama*, 357 U. S. 449, 462 (1958)."

chusetts General Laws Ann., c. 272, §§ 21 and 21A, violate the Equal Protection Clause. The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg* v. *California*, 283 U. S. 359.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115:

> "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

We held in *Thomas* v. *Collins*, 323 U. S. 516, that a person speaking at a labor union rally could not be required to register or obtain a license:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights

of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

". . . If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.*, at 539, 540.

Baird addressed an audience of students and faculty at Boston University on the subject of birth control and overpopulation. His address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices in their original packages. In addition, Baird spoke of the respective merits of various contraceptive devices; overpopulation in the world; crises throughout the world due to overpopulation; the large number of abortions performed on unwed mothers; quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Baird also urged members of the audience to petition the Massachusetts Legislature and to make known their feel-

ings with regard to birth control laws in order to bring about a change in the laws. At the close of the address Baird invited members of the audience to come to the stage and help themselves to the contraceptive articles. We do not know how many accepted Baird's invitation. We only know that Baird personally handed one woman a package of Emko Vaginal Foam. He was then arrested and indicted (1) for exhibiting contraceptive devices and (2) for giving one such device away. The conviction for the first offense was reversed, the Supreme Judicial Court of Massachusetts holding that the display of the articles was essential to a graphic representation of the lecture. But the conviction for the giving away of one article was sustained. 355 Mass. 746, 247 N. E. 2d 574. The case reaches us by federal habeas corpus.

Had Baird not "given away" a sample of one of the devices whose use he advocated, there could be no question about the protection afforded him by the First Amendment. A State may not "contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U. S. 479, 482. See also *Thomas* v. *Collins, supra; Pierce* v. *Society of Sisters*, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390. However noxious Baird's ideas might have been to the authorities, the freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the "conventional wisdom," may not be abridged. *Terminiello* v. *Chicago*, 337 U. S. 1. Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy.

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102.

The teachings of Baird and those of Galileo might be

of a different order; but the suppression of either is equally repugnant.

As Milton said in the Areopagitica, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

It is said that only Baird's conduct is involved and *United States* v. *O'Brien*, 391 U. S. 367, is cited. That case involved a registrant under the Selective Service Act burning his Selective Service draft card. When prosecuted for that act, he defended his conduct as "symbolic speech." The Court held it was not.

Whatever may be thought of that decision on the merits,[1] *O'Brien* is not controlling here. The distinction between "speech" and "conduct" is a valid one, insofar as it helps to determine in a particular case whether the purpose of the activity was to aid in the communication of ideas, and whether the form of the communication so interferes with the rights of others that reasonable regulations may be imposed.[2] See *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467 (DOUGLAS, J., dissenting).

[1] I have earlier expressed my reasons for believing that the *O'Brien* decision was not consistent with First Amendment rights. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 455 (concurring opinion).

[2] In *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, the Court upheld a state court injunction against peaceful picketing carried on in violation of a state "anti-restraint-of-trade" law. *Giboney*, however, is easily distinguished from the present case. Under the circumstances there present, "There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [state antitrust] policy a dead letter . . . . They were exercising their economic power together with that of their allies to *compel* Empire to abide by union rather than by state regulation of trade." *Id.*, at 503 (footnote omitted; emphasis supplied). There is no such coercion in the instant case nor is there a similar frustration of state policy, see text at n. 4, *infra*. For an analysis of the state policies underlying the Massachusetts statute which Baird was convicted of having violated, see Dienes, The Progeny of Comstockery—Birth Control Laws Return to Court, 21 Am. U. L. Rev. 1, 3–44 (1971).

Thus, excessive noise might well be "conduct"—a form of pollution—which can be made subject to precise, narrowly drawn regulations. See *Adderley* v. *Florida*, 385 U. S. 39, 54 (DOUGLAS, J., dissenting). But "this Court has repeatedly stated, [First Amendment] rights are not confined to verbal expression. They embrace appropriate types of action . . . ." *Brown* v. *Louisiana*, 383 U. S. 131, 141–142.

Baird gave an hour's lecture on birth control and as an aid to understanding the ideas which he was propagating he handed out one sample of one of the devices whose use he was endorsing. A person giving a lecture on coyote-getters would certainly improve his teaching technique if he passed one out to the audience; and he would be protected in doing so unless of course the device was loaded and ready to explode, killing or injuring people. The same holds true in my mind for mousetraps, spray guns, or any other article not dangerous *per se* on which speakers give educational lectures.

It is irrelevant to the application of these principles that Baird went beyond the giving of information about birth control and advocated the use of contraceptive articles. The First Amendment protects the opportunity to persuade to action whether that action be unwise or immoral, or whether the speech incites to action. See, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444; *Edwards* v. *South Carolina*, 372 U. S. 229; *Terminiello* v. *Chicago*, *supra*.

In this case there was not even incitement to action.[3] There is no evidence or finding that Baird intended that the young lady take the foam home with her when he handed it to her or that she would not have examined the

[3] Even under the restrictive meaning which the Court has given the First Amendment, as applied to the States by the Fourteenth, advocacy of law violation is permissible "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, *supra*, n. 1, at 447.

article and then returned it to Baird, had he not been placed under arrest immediately upon handing the article over.[4]

First Amendment rights are not limited to verbal expression. The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity as well as a display of a sign. A sit-in can be a quiet, dignified protest that has First Amendment protection even though no speech is involved, as we held in *Brown* v. *Louisiana*, *supra*. Putting contraceptives on display is certainly an aid to speech and discussion. Handing an article under discussion to a member of the audience is a technique known to all teachers and is commonly used. A handout may be on such a scale as to smack of a vendor's marketing scheme. But passing one article to an audience is merely a projection of the visual aid and should be a permissible adjunct of free speech. Baird was not making a prescription nor purporting to give medical advice. Handing out the article was not even a suggestion that the lady use it. At most it suggested that she become familiar with the product line.

I do not see how we can have a Society of the Dialogue, which the First Amendment envisages, if time-honored teaching techniques are barred to those who give educational lectures.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), we reversed criminal convictions for advising married per-

[4] This factor alone would seem to distinguish *O'Brien*, *supra*, as that case turned on the Court's judgment that O'Brien's "conduct" frustrated a substantial governmental interest.

[5] For a partial collection of cases involving action that comes under First Amendment protection see *Brandenburg* v. *Ohio*, *supra*, n. 1, at 455–456 (concurring opinion).

sons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation. 381 U. S., at 485.

Chapter 272, § 21, of the Massachusetts General Laws makes it a criminal offense to distribute, sell, or give away any drug, medicine, or article for the prevention of conception. Section 21A excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense on medical prescription.[1]

[1] Section 21 provides as follows:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Section 21A makes these exceptions:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish infor-

Appellee Baird was indicted for giving away Emko Vaginal Foam, a "medicine and article for the prevention of conception . . . ."[2] The State did not purport to charge or convict Baird for distributing to an unmarried person. No proof was offered as to the marital status of the recipient. The gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone. As the Supreme Judicial Court of Massachusetts noted, the constitutional validity of Baird's conviction rested upon his lack of status as a "distributor and not . . . the marital status of the recipient." *Commonwealth* v. *Baird*, 355 Mass. 746, 753, 247 N. E. 2d 574, 578 (1969). The Federal District Court was of the same view.[3]

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mation to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

[2] The indictment states:

"The Jurors for the Commonwealth of Massachusetts on their oath present that William R. Baird, on the sixth day of April, in the year of our Lord one thousand nine hundred and sixty-seven, did unlawfully give away a certain medicine and article for the prevention of conception, to wit; Emko Vaginal Foam, the giving away of the said medicine and article by the said William R. Baird not being in accordance with, or authorized or permitted by, the provisions of Section 21A of Chapter 272, of the General Laws of the said Commonwealth."

[3] "Had § 21A authorized registered physicians to administer or prescribe contraceptives for unmarried as well as for married persons, the legal position of the petitioner would not have been in any way altered. Not being a physician he would still have been prohibited by § 21 from 'giving away' the contraceptive." 310 F. Supp. 951, 954 (Mass. 1970).

I assume that a State's interest in the health of its citizens empowers it to restrict to medical channels the distribution of products whose use should be accompanied by medical advice. I also do not doubt that various contraceptive medicines and articles are properly available only on prescription, and I therefore have no difficulty with the Massachusetts court's characterization of the statute at issue here as expressing "a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." *Commonwealth* v. *Baird*, *supra*, at 753, 247 N. E. 2d, at 578. Had Baird distributed a supply of the so-called "pill," I would sustain his conviction under this statute.[4] Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in *Griswold*, but that burden is justified by a strong state interest and does not, as did the statute at issue in *Griswold*, sweep unnecessarily broadly or seek "to achieve its goals by means having a maximum destructive impact upon" a protected relationship. *Griswold* v. *Connecticut*, 381 U. S., at 485.

Baird, however, was found guilty of giving away vaginal foam. Inquiry into the validity of this conviction does not come to an end merely because some contraceptives are harmful and their distribution may be restricted. Our general reluctance to question a State's judgment on matters of public health must give way where, as here, the restriction at issue burdens the con-

[4] The Food and Drug Administration has made a finding that birth control pills pose possible hazards to health. It therefore restricts distribution and receipt of such products in interstate commerce to properly labeled packages which must be sold pursuant to a prescription. 21 CFR § 130.45. A violation of this law is punishable by imprisonment for one year, a fine of not more than $10,000, or both. 21 U. S. C. §§ 331, 333.

stitutional rights of married persons to use contraceptives. In these circumstances we may not accept on faith the State's classification of a particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice.

Neither requirement is met here. Nothing in the record even suggests that the distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health. Nor does the opinion of the Massachusetts court or the State's brief filed here marshal facts demonstrating that the hazards of using vaginal foam are common knowledge or so incontrovertible that they may be noticed judicially. On the contrary, the State acknowledges that Emko is a product widely available without prescription. Given *Griswold* v. *Connecticut*, *supra*, and absent proof of the probable hazards of using vaginal foam, we could not sustain appellee's conviction had it been for selling or giving away foam to a married person. Just as in *Griswold*, where the right of married persons to use contraceptives was "diluted or adversely affected" by permitting a conviction for giving advice as to its exercise, *id.*, at 481, so here to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right.

That Baird could not be convicted for distributing Emko to a married person disposes of this case. Assuming, *arguendo*, that the result would be otherwise had the recipient been unmarried, nothing has been placed in the record to indicate her marital status. The State has maintained that marital status is irrelevant because an unlicensed person cannot legally dispense vaginal foam

either to married or unmarried persons. This approach is plainly erroneous and requires the reversal of Baird's conviction; for on the facts of this case, it deprives us of knowing whether Baird was in fact convicted for making a constitutionally protected distribution of Emko to a married person.

The principle established in *Stromberg* v. *California*, 283 U. S. 359 (1931), and consistently adhered to is that a conviction cannot stand where the "record fail[s] to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict." *Street* v. *New York*, 394 U. S. 576, 586 (1969). To uphold a conviction even "though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams* v. *North Carolina*, 317 U. S. 287, 292 (1942).

Because this case can be disposed of on the basis of settled constitutional doctrine, I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring).

MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court,

and appellee has no standing to challenge that part of the statute restricting the persons to whom contraceptives are available. There is no need to labor this point, however, for everyone seems to agree that if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case. *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

The opinion of the Court today brushes aside appellee's status as an unlicensed layman by concluding that the Massachusetts Legislature was not really concerned with the protection of health when it passed this statute. MR. JUSTICE WHITE acknowledges the statutory concern with the protection of health, but finds the restriction on distributors overly broad because the State has failed to adduce facts showing the health hazards of the particular substance dispensed by appellee as distinguished from other contraceptives. MR. JUSTICE DOUGLAS' concurring opinion does not directly challenge the power of Massachusetts to prohibit laymen from dispensing contraceptives, but considers that appellee rather than dispensing the substance was resorting to a "time-honored teaching technique" by utilizing a "visual aid" as an adjunct to his protected speech. I am puzzled by this third characterization of the case. If the suggestion is that appellee was merely displaying the contraceptive material without relinquishing his ownership of it, then the argument must be that the prosecution failed to prove that appellee had "given away" the contraceptive material. But appellee does not challenge the sufficiency of the evidence, and himself summarizes the record as showing that "at the close of his lecture he invited members of the audience . . . to come and help themselves." On the other hand, if the concurring opinion means that the First Amendment protects the distribu-

tion of all articles "not dangerous *per se*" when the distribution is coupled with some form of speech, then I must confess that I have misread certain cases in the area. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968); *Cox* v. *Louisiana*, 379 U. S. 536, 555 (1965); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502 (1949).

My disagreement with the opinion of the Court and that of MR. JUSTICE WHITE goes far beyond mere puzzlement, however, for these opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process.

In affirming appellee's conviction, the highest tribunal in Massachusetts held that the statutory requirement that contraceptives be dispensed only through medical channels served the legitimate interest of the State in protecting the health of its citizens. The Court today blithely hurdles this authoritative state pronouncement and concludes that the statute has no such purpose. Three basic arguments are advanced: First, since the distribution of contraceptives was prohibited as a moral matter in Massachusetts prior to 1966, it is impossible to believe that the legislature was concerned with health when it lifted the complete ban but insisted on medical supervision. I fail to see why the historical predominance of an unacceptable legislative purpose makes incredible the emergence of a new and valid one.[1] See *McGowan*

[1] The Court places some reliance on the opinion of the Supreme Judicial Court of Massachusetts in *Sturgis* v. *Attorney General*, — Mass. —, 260 N. E. 2d 687 (1970), to show that § 21A is intended to regulate morals rather than public health. In *Sturgis* the state court rejected a challenge by a group of physicians to that part of the statute prohibiting the distribution of contraceptives to unmarried women. The court accepted the State's interest in "regulating the private sexual lives of single persons," that interest being expressed in the restriction on distributees. *Id.*, at —, 260 N. E. 2d, at 690. The purpose of the restriction on distributors was not in issue.

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v. *Maryland*, 366 U. S. 420, 445–449 (1961). The second argument, finding its origin in a dissenting opinion in the Supreme Judicial Court of Massachusetts, rejects a health purpose because, "[i]f there is need to have a physician prescribe . . . contraceptives, that need is as great for unmarried persons as for married persons." 355 Mass. 746, 758, 247 N. E. 2d 574, 581. This argument confuses the validity of the restriction on distributors with the validity of the further restriction on distributees, a part of the statute not properly before the Court. Assuming the legislature too broadly restricted the class of persons who could obtain contraceptives, it hardly follows that it saw no need to protect the health of all persons to whom they are made available. Third, the Court sees no health purpose underlying the restriction on distributors because other state and federal laws regulate the distribution of harmful drugs. I know of no rule that all enactments relating to a particular purpose must be neatly consolidated in one package in the statute books for, if so, the United States Code will not pass muster. I am unable to draw any inference as to legislative purpose from the fact that the restriction on dispensing contraceptives was not codified with other statutory provisions regulating the distribution of medicinal substances. And the existence of nonconflicting, nonpre-emptive federal laws is simply without significance in judging the validity or purpose of a state law on the same subject matter.

It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this Court to dismiss as dubious a state court's explication of a state statute absent overwhelming and irrefutable reasons for doing so.

MR. JUSTICE WHITE, while acknowledging a valid legislative purpose of protecting health, concludes that the State lacks power to regulate the distribution of the contraceptive involved in this case as a means of protecting health.[2] The opinion grants that appellee's conviction would be valid if he had given away a potentially harmful substance, but rejects the State's placing this particular contraceptive in that category. So far as I am aware, this Court has never before challenged the police power of a State to protect the public from the risks of possibly spurious and deleterious substances sold within its borders. Moreover, a statutory classification is not invalid

> "simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 204 (1912).

But since the Massachusetts statute seeks to protect health by regulating contraceptives, the opinion invokes *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and puts the statutory classification to an unprecedented test: either the record must contain evidence supporting the classification or the health hazards of the particular contraceptive must be judicially noticeable. This is indeed a novel constitutional doctrine and not surprisingly no authority is cited for it.

Since the potential harmfulness of this particular medicinal substance has never been placed in issue in the

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[2] The opinion of the Court states in passing that if the restriction on distributors were in fact intended as a health measure, it would be overly broad. Since the Court does not develop this argument in detail, my response is addressed solely to the reasoning in the concurring opinion of MR. JUSTICE WHITE.

state or federal courts, the State can hardly be faulted for its failure to build a record on this point. And it totally mystifies me why, in the absence of some evidence in the record, the factual underpinnings of the statutory classification must be "incontrovertible" or a matter of "common knowledge."

The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe that unanimity of expert opinion is a prerequisite to a State's exercise of its police power, no matter what the subject matter of the regulation. Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous on the next. It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.

Even if it were conclusively established once and for all that the product dispensed by appellee is not actually or potentially dangerous in the somatic sense, I would still be unable to agree that the restriction on dispensing it falls outside the State's power to regulate in the area of health. The choice of a means of birth control, although a highly personal matter, is also a health matter in a very real sense, and I see nothing arbitrary in a requirement of medical supervision.[3] It is generally acknowledged that contraceptives vary in degree of effec-

[3] For general discussions of the need for medical supervision before choosing a means of birth control, see Manual of Family Planning and Contraceptive Practice 47–53 (M. Calderone ed. 1970); Advanced Concepts in Contraception 22–24 (F. Hoffman & R. Kleinman ed. 1968).

tiveness and potential harmfulness.[4] There may be compelling health reasons for certain women to choose the most effective means of birth control available, no matter how harmless the less effective alternatives.[5] Others might be advised not to use a highly effective means of contraception because of their peculiar susceptibility to an adverse side effect.[6] Moreover, there may be information known to the medical profession that a particular brand of contraceptive is to be preferred or avoided, or that it has not been adequately tested. Nonetheless, the concurring opinion would hold, as a constitutional matter that a State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician.

It is revealing, I think, that those portions of the majority and concurring opinions rejecting the statutory limitation on distributors rely on no particular provision of the Constitution. I see nothing in the Fourteenth Amendment or any other part of the Constitu-

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[4] See U. S. Commission on Population Growth and the American Future, Population and the American Future, pt. II, pp. 38–39 (Mar. 16, 1972); Manual of Family Planning, *supra*, at 268–274, 316, 320, 342, 346; Jaffe, Toward the Reduction of Unwanted Pregnancy, 174 Science 119, 121 (Oct. 8, 1971); G. Hardin, Birth Control 128 (1970); E. Havemann, Birth Control (1967). The contraceptive substance dispensed by appellee, vaginal foam, is thought to be between 70 and 80% effective. See Jaffe, Toward the Reduction of Unwanted Pregnancy, *supra*, at 121; Dingle & Tietze, Comparative Study of Three Contraceptive Methods, 85 Amer. J. Obst. & Gyn. 1012, 1021 (1963). The birth control pill, by contrast, is thought to be better than 99% effective. See Havemann, Birth Control, *supra*.

[5] See Perkin, Assessment of Reproductive Risk in Nonpregnant Women—A Guide to Establishing Priorities for Contraceptive Care, 101 Amer. J. Obst. & Gyn. 709 (1968).

[6] See Manual of Family Planning, *supra*, at 301, 332–333, 336–340.

tion that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. I do not challenge *Griswold* v. *Connecticut*, *supra*, despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.

The need for dissemination of information on birth control is not impinged in the slightest by limiting the distribution of medicinal substances to medical and pharmaceutical channels as Massachusetts has done by statute. The appellee has succeeded, it seems, in cloaking his activities in some new permutation of the First Amendment, although his conviction rests in fact and law on dispensing a medicinal substance without a license. I am constrained to suggest that if the Constitution can be strained to invalidate the Massachusetts statute underlying appellee's conviction, we could quite as well employ it for the protection of a "curbstone quack," reminiscent of the "medicine man" of times past, who attracted a crowd of the curious with a soapbox lecture and then plied them with "free samples" of some unproved remedy. Massachusetts presumably outlawed such activities long ago, but today's holding seems to invite their return.